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No. 85-2127

In The
Supreme Court of the United States
October Term, 1985

LTC BILLY McDANIEL,
Petitioner,

v.

ROY JOHNSON and JOHN SHELLER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals erred in ruling that the Adjutant General (acting as an agent of the Secretary of the Air Force) and federal technician supervisory personnel act under the color of state law for purposes of 42 *U.S.C.* § 1983 when participating in personnel decisions exclusively under the authority of 32 *U.S.C.* § 709.

Whether the comprehensive system of remedies available for federal employees including technicians evidences congressional intent to preclude a 42 *U.S.C.* § 1983 remedy.

STATEMENT OF THE PARTIES

The appellant in Third Circuit Docket No. 84-5859 was Lieutenant Colonel (LTC) Billy McDaniel. Appellants in Docket No. 84-5860 were Major General (Ret.) Wilfred C. Menard, Brigadier General Charles Young and Colonel (Ret.) John Murphy. Appearing as amici curiae were the Adjutants General Association of the United States, the State of California and the Adjutant General of the California National Guard.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
STATEMENT OF THE PARTIES	ii
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
POINT I	
THIS COURT SHOULD GRANT THE WRIT IN ORDER TO FINALLY AND AUTHORITATIVELY RESOLVE THE CONFLICT CREATED BY THE DECISION BELOW.	7
POINT II	
THIS COURT SHOULD GRANT THIS PETITION FOR A WRIT OF CERTIORARI BECAUSE THE DECISION OF THE THIRD CIRCUIT ENDANGERS NATIONAL SECURITY.	16
CONCLUSION	18

APPENDICES

Appendix A — Opinion of the Third Circuit Court of Appeals No. 84-5859 and 84-5860	1a
Appendix B — Opinion of the Third Circuit Court of Appeals No. 84-5877 and 84-5888	45a
Appendix C — Opinion of the District Court certifying a controlling question of law	66a
Appendix D — Opinion of the District Court denying motions on immunity grounds	74a

TABLE OF CONTENTS—Continued

Page

Appendix E — Order denying petition for rehearing ... 85a

Appendix F — Order granting motions for recall of mandate and to file petition for rehearing ... 87a

Appendix G — Order granting motion to certify a controlling question of law ... 89a

Appendix H — Abbreviated Administrative Record ... 92a

Appendix I — Former text of 32 *U.S.C.* § 709 ... 108a

TABLE OF AUTHORITIES

Cases Cited

American Federation of Government Employees, AFL-CIO, Local 2953 v. Federal Labor Relations Authority, 730 *F.*2d 1534 (D.C. Cir. 1984) ... 8

Askew v. Bloemaker, 548 F.2d 673 (7th Cir. 1976) ... 9

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 *U.S.* 388 (1971) ... 6, 10, 14

Bush v. Lucas, 462 *U.S.* 367, (1983) ... 7, 10, 14

Chaudoin v. Atkinson, 494 *F.*2d 1323 (3rd Cir. 1974) ... 10, 15

Ellis v. Blum, 643 *F.*2d 68 (2d Cir. 1981) ... 9

Feres v. United States, 340 *U.S.* 135 (1950) ... 16

Jackson v. Metropolitan Edison Co., 419 *U.S.* 345 (1974) ... 11

Johnson v. Orr, 776 *F.*2d 75 (3rd Cir. 1985) ... 1, 5, 15

Johnson v. Orr, 780 *F.*2d 386 (3rd Cir. 1986) ... 1, 9, 10, 14

TABLE OF AUTHORITIES—Continued

Page

King v. Smith, 392 *U.S.* 309 (1968) 11

Krynicky v. University of Pittsburg, 742 *F.*2d 94 (3rd Cir. 1984) 11

Lasher v. Schafer, 460 *F.*2d 343 (3d Cir. 1972) 13

Lynch v. Donnelly, — *U.S.* — (1985) 12

Lynn v. U.S. Dept. of Health and Human Services, 583 *F. Supp.* 532 (D.C.N.Y. 1984) 9

Lugar v. Edmondson Oil Co., Inc., 457 *U.S.* 922 (1982) 11, 12

Maryland v. United States, 381 *U.S.* 41 (1965) vacated 382 *U.S.* 159 (1965) 13

Middlesex County Sewage Authority v. Nat'l Sea Clammers Assn., 453 *U.S.* 1 (1981) 14

Mollnow v. Carlton, 716 *F.*2d 627 (9th Cir. 1983) 16

Monroe v. Pape, 365 *U.S.* 167 (1961) 10

NeSmith v. Fulton, 615 *F.*2d 196 (5th Cir. 1980) 10, 11

New Jersey Air National Guard v. FLRA, 677 *F.*2d 276 (1982), *cert.* denied sub nom *AFGE Local 3486 v. NJANG*, 459 *U.S.* 988 (1982) 7

Pickering v. Board of Education, 391 *U.S.* 563 (1968) 17

Polk County v. Dodson, 454 *U.S.* 312 (1981) 11, 12

Rivera v. Heckler, 568 *F. Supp.* 235 (D.N.J. 1983) 9

Rowe v. State of Tenn., 609 *F.*2d 259 (6th Cir. 1979) 10, 11, 16

Screws v. United States, 325 *U.S.* 91 (1945) 10

TABLE OF AUTHORITIES—Continued

	Pages
Smith v. Robinson, 104 *S.Ct.* 3457 (1984)	14
United States v. Brown, 348 *U.S.* 110 (1954)	16
United States v. Muniz, 374 *U.S.* 150 (1963)	16
Vargas v. Chardon, 405 *F. Supp.* 1348 (D.P.R. 1975)	9

STATUTES CITED

5 *U.S.C.* § 701	4, 5, 14, 15
5 *U.S.C.* § 7101	15
10 *U.S.C.* § 311	7
10 *U.S.C.* § 672	8
18 *U.S.C.* § 52	10
28 *U.S.C.* § 1254(1)	1
28 *U.S.C.* § 1292(b)	5, 6
28 *U.S.C.* § 1331	6
28 *U.S.C.* § 1343	6
32 *U.S.C.* § 101	8
32 *U.S.C.* § 104(c)	8
32 *U.S.C.* § 304	8
32 *U.S.C.* § 502	8
32 *U.S.C.* § 503	8
32 *U.S.C.* § 709	1, 5, 13, 14, 15
32 *U.S.C.* § 709(a)-(e)	3, 13
32 *U.S.C.* § 709(e)	4, 13
42 *U.S.C.* § 1983	*passim*
42 *U.S.C.* § 1985	16

TABLE OF AUTHORITIES—Continued

	Pages
N.J.S.A. 38A:1-1	8
N.J.S.A. 59:1-1	16

CONSTITUTIONAL PROVISION

U.S. Constitution, Art. 1, § 8, cl. 16	7

OTHER AUTHORITIES

H.R. Rep. 1823, 90th Cong., 2d Sess. 1 (1968)	11
S. Rep. 1446, 90th Cong., 2d Sess. 1 (1968)	8
Zagrans, *Under Color of What Law: A Reconstructed Model of § 1983 Liability*, 71 VA. L. REV. 499 (1985)	10
F.P.M. 630.11-.14	8
N.G.R. 600-5¶3-F1	9
Fed.R. Civ.P. 52(b)	5
Army Magazine, Vol. 24, No. 8, Aug. 1974	12

OPINION BELOW

The decision in issue is reported at *Johnson v. Orr,* 780 *F.*2d 360 (3rd Cir. 1986), reh'g denied (March 16, 1986) (App. 1a). A second decision detailing other aspects of the case is reported at *Johnson v. Orr.,* 776 *F.*2d 75 (3rd. Cir. 1985) (App. 45a).

JURISDICTION

The opinion of the Third Circuit Court of Appeals was filed January 13, 1985 (App. A). A timely petition for rehearing with a suggestion for rehearing en banc was denied March 16, 1986 (App. E). Jurisdiction of the Court is invoked pursuant to 28 *U.S.C.* §1254(1).

STATUTORY PROVISIONS INVOLVED

Two statutory provisions are involved in this petition, the Technicians Act 32 *U.S.C.* § 709 and 42 *U.S.C.* § 1983:

THE TECHNICIANS ACT

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in —

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.

(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned —

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment. [32 *U.S.C.* § 709(a)—(e)].

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [42 *U.S.C.* § 1983].

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STATEMENT OF THE CASE

Plaintiffs Roy Johnson and John Sheller were civilian employees of the United States Air Force working as technicians with the New Jersey National Guard in accordance with 32 *U.S.C.* § 709(e) (App. A). Johnson worked as a mechanic on the bomb loading systems of jet aircraft and Sheller worked as a mechanic on the electrical systems of these aircraft (App. 92a, 94a). Col. John Murphy, plaintiffs supervisor, recommended their discharge for calling a meeting on company time to advocate a work slowdown or disruption of the Tactical Wing Mission in retaliation for a command decision that required technicians to work on Labor Day weekend (App. 48a, 92a). General Charles Young, the next level technician supervisor, accepted the recommendation after considering plaintiffs' statements and other investigative reports (App. 50a). Plaintiffs have alleged that the assistant technician personnel officer, petitioner LTC Billy McDaniel, advised plaintiffs' supervisory personnel on the discharge.

Johnson and Sheller appealed the dismissal to Maj. General Wilfred C. Menard, then Adjutant General of New Jersey (App. H). Both were afforded a hearing before a hearing examiner appointed by the United States National Guard Bureau (App. 99a). The Adjutant General reviewed the entire record and upheld plaintiffs' termination from employment (App. 105a).

Plaintiffs filed suit in federal district court requesting a review of the agency action under the Administrative Procedures Act, 5 *U.S.C.* § 701, and alleging violations of their constitutional rights to due process and freedom of speech *inter alia* under 42 *U.S.C.* § 1983 (App. A). Col. Murphy,

LTC McDaniel, General Young and Adjutant General Menard were named as defendants on the 42 *U.S.C.* § 1983 claim. Verne Orr, Secretary of The Air Force, and Major General Francis Gerard, the present Adjutant General, were named as the defendants on the 5 *U.S.C.* § 701 claim.

In response to cross-motions for summary judgment, the district court held that the defendants acted under the color of state law for purposes of 42 *U.S.C.* § 1983, granted summary judgment to the individual defendants on the due process claim and denied summary judgment on the First Amendment claim. On the claims under the APA, the Court held that the decision of the Adjutant General was not supported by substantial evidence in the record. On a series of motions the Court denied respondents reinstatement since each had separated from the New Jersey National Guard, and concurrent membership in the Guard is a prerequisite to technician employment,* and certified a controlling question of law under 28 *U.S.C.* § 1292(b).** The question was stated:

> Whether, under authority of 32 *U.S.C.* § 709, technician supervisory personnel and the Adjutant General of the State of New Jersey, act under color of state law for purposes of 42 *U.S.C.* § 1983 when participating in personnel decisions resulting in the dismissal of two technician employees?

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*The court had earlier transferred plaintiffs' claims for back pay to the U.S. Court of Claims and denied defendants' motions on immunity theories (App. 47a).

**All other portions of that order were certified as final under *Fed. R. Civ. P.* 52(b) and disposed of in *Johnson v. Orr*, 776 F.2d 75 (3rd Cir. 1985), a companion case, and are not in issue here (App. B).

The Third Circuit Court of Appeals then granted the individual defendants' joint petition for leave to file an interlocutory appeal.

The Third Circuit held that all defendants acted under color of state law. Although conceding that the Adjutant General acted as a federal agent in removing technicians from federal employment, the majority reasoned that Congress had left control of technician decisions at the state level and this hybrid status allowed a § 1983 remedy (App. 15a).

One circuit judge dissented, strongly disagreeing with the holding that a state official who is the designated agent of the federal government acts under color of state law. The dissent also stressed that the comprehensive employment remedies available to federal employees precluded the availability of 42 *U.S.C.* § 1983 (App. 23a). A timely request for rehearing with a suggestion for rehearing *in banc* was denied on March 17, 1986.

The District Court had subject matter jurisdiction over the instant action under 28 *U.S.C.* §§ 1331 and 1343. The Third Circuit had jurisdiction to consider the certified question of law under 28 *U.S.C.* § 1292(b).

LTC McDaniel submits that the Court should review this matter to resolve conflicts in the application of color of state law criteria to federal activities conducted at state level and in order to address the anomalous result of the Third Circuit's decision which creates a special category of federal employees who are permitted to sue their supervisors for employee disciplinary decisions in a constitutional tort action which parallels the relief no longer available under *Bivens v. Six Unknown Named Agents of the*

Federal Bureau of Narcotics, 403 *U.S.C.* 388 (1971). See *Bush v. Lucas*, 462 *U.S.* 367 (1983).

This case also presents a question affecting the performance of the National Guard units as a reserve force of the United States military since technicians, although civilian employees, are a full time federal presence whose mission is to ensure readiness of state located military units for national emergencies.*

REASONS FOR GRANTING THE WRIT

POINT I

THIS COURT SHOULD GRANT THE WRIT IN ORDER TO FINALLY AND AUTHORITATIVELY RESOLVE THE CONFLICT CREATED BY THE DECISION BELOW.

Conflicts arise in this case because of the hybrid nature of the National Guard and the dual nature of technician employment. See *New Jersey Air National Guard v. FLRA*, 677 *F.*2d 276 (3rd Cir. 1982) *cert.* denied *sub nom AFGE Local 3486 v. NJANG*, 459 *U.S.* 988 (1982). The National Guard is a hybrid organization created by the U.S. Constitution, Art. 1, § 8, cl. 16 under which Congress has utilized the state militias as reserves to the standing United States Armed Forces. 10 *U.S.C.* § 311. The National Guard of

*Other petitioners in this action, General Young, General Menard and Major Murphy are represented by the United States Attorney for the District of New Jersey. A final decision on whether they will petition for a *writ of certiorari* had not been made at the time of this printing.

New Jersey represents that portion of the National Guard of the United States that is located within the jurisdiction of the State of New Jersey 32 *U.S.C.* § 101.

When not mobilized pursuant to 10 *U.S.C.* § 672 the National Guard has been held to be in state service although all training is conducted in a federal pay status 32 *U.S.C.* § 502, 503, 304. Component commands in the National Guard extend beyond state borders, *e.g.*, the 50th Armored Division headquartered in New Jersey with the New Jersey National Guard has subordinate units in Vermont, Maryland and New Mexico 32 *U.S.C.* § 104(c). The National Guard differs from the state militia which acts upon the call of the governor to meet state emergencies or disasters, and for which members are paid by the state *N.J.S.A.* 38A:1-1 *et seq.* Thus the mission of the National Guard as a federal reserve differs from the mission of the state militia.

Technicians such as petitioner and respondents function within the National Guard in three ways: performing full time civilian work in their units, performing military training duty in their units, and being available to enter active federal service at any time their units are called. S. Rep. No. 1446, 90th Cong., 2d Sess. 2 (1968). *American Federation of Government Employees, AFL-CIO, Local 2953 v. Federal Labor Relations Authority,* 730 *F.*2d 1534 (D.C. Cir. 1984). But, although technicians must maintain membership in the National Guard to hold their federal employment, technicians must take military leave from their technician positions to serve in any military status either with the state militia or with the National Guard FPM 630.11-.14*. Payment for National Guard training and state

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*Federal Personal Manual.

militia duty is separate from technician pay NGR 600-5¶3-1F**.

(a) Certiorari Should Be Granted To Resolve The Legal Conflict Created By The Third Circuit's Ruling.

The Third Circuit Court of Appeals ruled that the Adjutant General and the technician defendants acted under color of state law for purposes of 42 *U.S.C.* § 1983 when disciplining other federal employees. *Johnson v. Orr,* 780 *F.*2d 386 (3rd Cir. 1985) (App. A) reh'g denied (March 17, 1986). This ruling conflicts with other circuits that have addressed the color of state law requirement in regard to activities performed by state or federal officials at the local level when the activities are governed by federal programs. *See Askew v. Bloemaker,* 548 *F.*2d 673 (7th Cir. 1976), holding that federal agents acting with state law enforcement officials, and state law enforcement officials acting dually as federal agents, did not act under color of state law in a raid resulting from a federal investigation. *See also Ellis v. Blum,* 643 *F.*2d 68 (2d Cir. 1981), holding state employees following federal regulations in issuing social security redetermination notices were acting under federal, not state law. *Accord, Rivera v. Heckler,* 568 *F. Supp.* 235, 243 (D.N.J. 1983); *Lynn v. U.S. Dept. of Health and Human Services,* 583 *F. Supp.* 532 (S.D.N.Y. 1984); *see also Vargas v. Chardon,* 405 *F. Supp.* 1348 (D.P.R. 1975) holding an adjutant general does not act under color of state law in administering these federal employees. These cases

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**National Guard Regulation promulgated by the U.S. National Guard Bureau.

focused upon the acts being performed and the context of the performance.

The Third Circuit in *Johnson* focuses instead upon status. Although reiterating that the Adjutant General acts as an agent of the federal government in administering the technician program, *Chaudoin v. Atkinson,* 494 *F.*2d 1323 (3rd Cir. 1974), the court relies upon cases which find the mixture of state and federal functions determinative of the color of state law test. *Rowe v. Tenn,* 609 *F.*2d 259 (6th Cir. 1979) and *NeSmith v. Fulton,* 615 *F.*2d 196 (5th Cir. 1980). The Court chose to ignore the flawed reasoning in each case.

The *Rowe* court, for example, reasoned that a § 1983 remedy should supplement a suit under *Bivens, supra,* for the Court perceived a gap in remedies provided by *Bivens.* Such reasoning is no longer applicable since this Court has precluded *Bivens* suits in federal employment actions. *Bush v. Lucas,* 462 *U.S.* 367 (1982). Moreover, *Rowe* rejected the applicability of "under color of state law" reasoning in *Monroe v. Pape,* 365 *U.S.* 167 (1961), using instead a quote from *Screws v. United States,* 325 *U.S.* 91 (1945). *Screws,* however, did not deal with 42 *U.S.C.* § 1983, but with a different statute, 18 *U.S.C.* § 52:

> whoever, under color of *any* law, statutes, ordinance, regulation or custom, wilfully subjects or causes any inhabitant of any state, Territory or District to the deprivation of any rights . . . [Emphasis added]

Since the language of the statute construed in *Screws* differs materially from 42 *U.S.C.* § 1983, it cannot be used as precedent in determining the meaning of the phrase "under color of state law." *See* Zagrans, *Under Color of What*

Law: A Reconstructed Model of § 1983 Liability, 71 VA. L. REV. 499 (1985). Likewise, the references in *Rowe* to *King v. Smith,* 392 *U.S.* 309 (1968) provide no comparison to the federal status in the instant case. In *King,* the plaintiffs challenged a *state* regulation aimed at denying aid to families with dependent children (AFDC) benefits to a woman who cohabited with a man, not her husband. No challenge to the applicability of 42 *U.S.C.* § 1983 was made in the *King* case precisely because state employees acted pursuant to a state regulation. No federal regulation required the state officials to ban AFDC eligibility when a woman lived with a man not her husband. Thus, state officials acted under color of a state regulation in denying plaintiff a property right.

In *NeSmith, supra,* the Fifth Circuit Court of Appeals found state action resulted from the status of the Adjutant General as a state employee. *NeSmith, supra,* 615 *F.*2d at 200. The court found the legislative history of the Technicians Act persuasive since administrative authority over the technician program remained "as a matter of law at state level. *Id.* citing H.R. Rep. No. 1823, 90th Cong., 2nd Sess. (1968), 1968 *U.S. Code Cong. and Admin. News* p.3324.

Each of these cases predates this Court's color of state law anlysis that concentrates upon the *act,* rather than the status of the actors. *Lugar v. Emondson Oil Co., Inc.,* 757 *U.S.* 922 (1982); *Polk County v. Dodson,* 454 *U.S.* 312 (1981). In light of these cases, the Third Circuit's reliance upon *Krynicky v. University of Pittsburgh,* 742 *F.*2d 94 (3rd Cir. 1984) and *Jackson v. Metropolitan Edison Co.,* 419 *U.S.* 345 (1974) was error. In joint state federal activities the nexus of state connections are self-evident. For

example, when evaluating a state employee's acts, the employee's relationship to the Governor is always evident. The source of his pay is evident. But, these indicia may be irrelevant nonetheless. The Third Circuit's emphasis on the Governor's control of the state militia is such an irrelevant detail. In a parallel line of reasoning this Court in *Lynch v. Donnelly*, 465 *U.S.* 668, 680 (1985) cautioned that concentration on the religious purpose in a first amendment evaluation always results in a distorted analysis. Likewise concentrating on state elements in joint federal state activities will always lead to a conclusion that the color of state law requirement is satisfied. But both *Lugar, supra,* and *Polk, supra,* require an evaluation of the alleged act within the context of the program, the source of the regulatory requirements and the program goals.

Essentially then, the Third Circuit focused solely upon the status of the Adjutant General as a state official. The Court also confused the interactions of military duties with technician functions in finding color of state law. This analysis should be rejected since the status alone should not control and the technician program is separable from the military function.*

Confusion has plagued the National Guard through its evolution into a strong national defense organization under the "Total Force Plan." *See Army Magazine,* Vol. 24, No. 8, Aug. 1974. The status of technicians and coverage

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*Indeed the military function in this case represents a federal, not state, mission. The jet fighters being maintained by respondents represent no legitimate state function but exist solely for national defense functions. Moreover plaintiffs here were discharged from technician positions without any actions relating to the military position with the National Guard.

under the Federal Tort Claims Act engendered numerous conflicting opinions prior to the 1968 amendment which clarified that technicians were federal employees. See *e.g.*, cases cited in *Maryland v. United States*, 381 *U.S.* 41, 44 (1965) vacated 382 *U.S.* 159 (1965) affirming 329 *F.*2d 722 (3rd Cir. 1964). In 1968, 32 *U.S.C.* § 709 was amended to end the legal conflict of the hybrid status of the technician. The amendment unequivocally changed state caretakers into technicians with federal employment status. Compare 32 *U.S.C.* § 709 with prior law at App. I. The House report stated the amendment's purpose:

> to clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions . . . .

Despite this legislative clarification, the Third Circuit has ignored the federal character of the technician program and focused upon the Adjutant General's state relationships to find color of state law in the discharge of federal employees. Indeed, the Circuit Court found nothing in the amendment to 32 *U.S.C.* § 709 that would alter its decision in *Lasher v. Shafer*, 460 *F.*2d 343 (3rd Cir. 1972). Although Congress left administration of the program at the state level as discussed in the amendment's history, this alone does not equal color of law. The act performed in this case, the firing of two federal employees, stems solely from federal law and regulations. This entire area of law has been preempted by Congress, and the State cannot legislate in this area nor legitimately interfere in the administration. Thus these acts are performed only within the scope of the agency permitted by federal statute 32 *U.S.C.* § 709(e). Review by this Court is required to restore uni-

formity in the determination of whether acts are done under the color of state law when a state official and federal employees act solely under federal law in the administration of a federal program.

(b) The Third Circuit's Decision Creates A Special Category Of Federal Employees Who May Sue Their Supervisors For Personnel Actions Conflicting With This Court's Decision.

In *Bush v. Lucas,* 462 *U.S.* 367 (1983) this Court determined that the comprehensive federally prescribed remedies for employee discipline were a special factor counseling hesitation and weighing against constitutional tort suits brought pursuant to *Bivens, supra.* By permitting a 42 *U.S.C.* § 1983 suit, the Third Circuit Court has carved out a group of some 53,000 federal employees who may maintain both remedial actions under 5 *U.S.C.* § 701 and a lawsuit for the violation of constitutional rights (App. 21 n.17).

Although a 42 *U.S.C.* § 1983 suit differs in origin from the judicially created remedy in *Bivens,* the dissent in *Johnson* found that precedent exists for precluding a § 1983 remedy when a comprehensive remedial scheme exists. *Middlesex County Sewage Authority v. National Sea Clammers Association,* 453 *U.S.* 1 (1981); *Smith v. Robinson,* 104 *S.Ct.* 3457 (1984). When comprehensive remedies exist, this Court has determined that Congress intended to foreclose a 42 *U.S.C.* § 1983 remedy.

While the Third Circuit rejected this argument because 32 *U.S.C.* § 709 did not create a "comprehensive" scheme,

this holding was incorrect. 32 *U.S.C.* § 709 creates the federal employment status which then entitles technicians to the remedies of the Civil Service Reform Act. The only difference between technicians and other federal employees is the forum for review. Technicians seek a review of agency record under the A.P.A., 5 *U.S.C.* § 701.* *Chaudoin, supra,* 494 *F.*2d at 323, N.5. But, like all other federal employees, technicians may file unfair labor practices and grievances 5 *U.S.C.* § 7101 *et seq.* Technicians may also contract with the Adjutant General on certain details governing working hours, *etc.* Congress thus specially crafted a system to remedy the employment grievances of technicians subject to the peculiar characteristics of the National Guard. While 32 *U.S.C.* § 709 is not a lengthy statute, other statutes defining and supplementing the technician employment rights do indeed create a comprehensive system which should preclude § 1983 suits.

This Court should therefore grant the petition for a writ of certiorari to resolve the conflict created by the Third Circuit's holding that a discharge of a technician from his federal employment is done under color of state law for purposes of 42 *U.S.C.* § 1983 while substantial federal remedies exist in other statutes to provide parallel relief.

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*Respondents have in fact prevailed on their suit. *Johnson v. Orr,* 776 F.2d 75 (3rd Cir. 1985).

POINT II

THIS COURT SHOULD GRANT THIS PETITION FOR A WRIT OF CERTIORARI BECAUSE THE DECISION OF THE THIRD CIRCUIT ENDANGERS NATIONAL SECURITY.

As this Court has recognized, the military fosters a peculiar and special relationship of the soldier to his superiors, which may be detrimentally affected by the maintenance of such suits challenging disciplinary actions. *United States v. Muniz*, 374 *U.S.* 150 (1963) quoting *United States v. Brown*, 348 *U.S.* 110 (1954). *Accord, Feres v. United States*, 340 *U.S.* 135 (1950). See also *Mollnow v. Carlton*, 716 *F.*2d 627 (9th Cir. 1983) holding a 42 *U.S.C.* § 1985 remedy unavailable to military personnel. In this case technicians hold their civilian federal employment in the military context and this Court should weigh whether the military concern for discipline should affect the color of law analysis since the acts complained of stem from military decision making.

The holding of the Third Circuit in this case chills decision making in the administration of the technician program since decision makers face the threat of damage awards in making such decisions.* This chill of course, spreads to military decision making. Indeed, in relying upon *Rowe*, this circuit *sub silentio* adopts the position that acts involving both military personnel and technicians may engender a § 1983 suit, for the *Rowe* case involved more than strictly civilian personnel decisions.

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*Technicians are not eligible for indemnification for such damages by either the state or federal government. The Adjutant General in New Jersey may be indemnified under *N.J.S.A.* 59:1-1 *et seq.* except for punitive damages.

If purely personnel actions, taken in a federal program which supports the national security, are considered acts done under the color of state law, the maintenance of 42 *U.S.C.* § 1983 suits will affect military discipline and control. The Facts of the instant case demonstrate this problem. In this case the constitutional rights allegedly violated was the First Amendment right to freedom of speech and association. The trial court, on renewed motions for summary judgment ruled that the balancing test enunciated in *Pickering v. Bd. of Education,* 391 *U.S.* 563 (1968) would govern (App. D). Therefore, petitioners presumably must establish that the technicians' actions seriously threatened to disrupt an important military mission (App. 77a). Defendants have represented to the court that this balancing involves a military mission classified top secret by the United States Air Force (App. 79a).

This case therefore differs significantly from the purely state situation when the militia acts upon an order of the governor solely for a state purpose. It is a case that demands examination of the interests being served by the actor. Here, in a unique federal state activity, the interests being served and the act allegedly performed stem from federal purposes defined in federal statute.

This Court should not ignore the potential impact § 1983 suits will have upon federal military mission performance, but should grant certiorari to settle an issue affecting national security.

CONCLUSION

For the reasons set forth herein, this Court should issue a writ of certiorari to the Third Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 84-5859 and 84-5860

ROY A. JOHNSON and JOHN J. SHELLER,

Appellees

v.

VERNE ORR, Secretary of the Air Force, FRANCIS GERARD, Major General, WILFRED C. MENARD, JR., Major General, COLONEL JOHN MURPHY, BRIGADIER GENERAL CHARLES YOUNG, Air Commander LT. COL. BILLY MC DANIEL

Air Commander Lt. Col. Billy McDaniel

Appellant in No. 84-5859

Wilfred C. Menard, Jr., Major General, Colonel John Murphy, Brigadier General Charles Young,

Appellants in No. 84-5860

On Appeal from the United States District Court for the District of New Jersey
(D.C. Crim. No. 84-8121)

Argued September 10, 1985

Before: SEITZ, BECKER and ROSENN,
Circuit Judges

(Filed January 13, 1986)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

The issue before us, on a certified question from the district court, 28 U.S.C. § 1292(b) (1982), is whether Air National Guard ("ANG") technician supervisory personnel and the New Jersey Adjutant General act under color of state law for the purposes of 42 U.S.C. § 1983 (1982) when participating in personnel decisions resulting in the dismissal of ANG technicians. The district court held that they do, and we affirm.

I.

Appellees Roy A. Johnson and John J. Sheller were ANG technicians and stewards in the technicians' union, Local 377 of the American Federation of Government Employees. As a result of a series of events arising out of a dispute over a proposed change in the technicians' work hours, appellees were discharged. The discharges were upheld in administrative hearings before an ANG hearing examiner, whose findings were adopted by the New Jersey Adjutant General.

On August 6, 1982 appellees brought this action in the district court for the District of New Jersey against their supervisors John Murphy and Charles Young; Secretary of the Air Force Verne Orr; Major General Willard Menard, who was New Jersey Adjutant at the time of appellees discharge; and Major General Francis Gerard, who succeeded Menard as New Jersey Adjutant General. Appellees' complaint alleged improper discharge in violation of their first and fifth amendment rights (*Bivens* claims)[1]; improper discharge in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq* (1982); and violation of 42 U.S.C. § 1983 on account of due process and various first and fifth amendment infractions. An amended complaint was filed in January, 1984, adding as a defendant Billy McDaniel, a technician personnel officer who had advised the other defendants concerning the discharge of plaintiffs.[2]

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1. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

2. All of the defendants except Orr and Gerard were charged with violating 42 U.S.C. § 1983.

Following a hearing in March, 1983, the district court transferred all damage claims to the United States Claims Court pursuant to 28 U.S.C. § 1406(c) (1982) and dismissed the *Bivens* claims. Both sides moved for summary judgment with respect to the remaining claims. In July, 1984 the district court granted summary judgment for plaintiffs on their APA claims and summary judgment for defendants with respect to the due process claim. The district court denied summary judgment with respect to the other claims brought under section 1983, specifically rejecting defendants' argument that a section 1983 action could not be brought against National Guard supervisory personnel. On a motion for partial reconsideration, the district court agreed to certify for interlocutory appeal the question whether persons such as Murphy, Young, McDaniel, and Menard, who discharge technicians employed under 32 U.S.C. § 709, act under the color of state law for section 1983 purposes. This court accepted the certification and defendants appealed.[3]

II.

The question whether appellants acted under color of state law is difficult because of the National Guard's

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3. In Johnson v. Orr, 776 F.2d 75 (3d Cir. 1985), this panel heard an appeal on all aspects of the case except the one now before us. We upheld the district court's grant of summary judgment for appellees under the APA and for appellants on the claim of violation of due process. As a result of that disposition, the other claims brought under section 1983 are all that remains in the district court. Those claims have been stayed pending our decision on this interlocutory appeal. In addition, the United States Court of Claims retains jurisdiction over the damage claims.

unusual "hybrid" status as an agency with both federal and state characteristics. In *New Jersey Air Nat'l Guard v. Fed. Labor Rel. Auth.*, 677 F.2d 276 (3d Cir. 1982), we described this status as follows:

> The National Guard occupies a unique position in the federal structure . . . This role does not fit neatly within the scope of either state or national concerns; historically the guard has been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law. Id. at 278-279.

Indeed, the Guard's function, as well as its structure, is hybrid. The Guard "serves the state in time of civil emergencies within the state as well as being available for federal service during national emergencies." *Engblom v. Carey*, 522 F.Supp 57, 65 (S.D. N.Y. 1981).

Appellants focus on the federal statutory scheme that governs ANG, 32 U.S.C. § 709 (1983). They point out first that the 1968 National Guard Technicians Act makes them (with the exception of Adjutant General Menard, a state cabinet officer appointed by the governor) federal employees.[4] Appellants further emphasize that their

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4. The National Guard Technicians Act of 1968 provides in part:

> A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States.

32 U.S.C. § 709(d).

Thus, the 1968 Act made Johnson and Orr, as well as appellants, federal employees. Appellees' employment status

(Continued on following page)

authority to discharge appellees derives directly and exclusively from federal statute and that such discharges are effected pursuant to regulations prescribed by the Secretary of the Air Force, 32 U.S.C. 709(e).[5] They contend that New Jersey Air National Guard Regulations 40-13 (NJANG) does not constitute state law for section 1983 purposes because it simply restates the relevant federal regulation: NJANG's stated purpose is to "provide for the administration of the NJ Army and Air National Guard Technician Program and *implement the provisions of the National Guard Bureau Technician Personnel Manual, Technician Personnel Pamphlets and applicable regulations of the U.S. Civil Service Commission's Federal Personnel manual.*" (emphasis added) Appellants argue that they could not possibly have acted under the color of state law, for there is no state law directing or authorizing their actions.

Appellants also argue that the Supreme Court's holding in *Bush v. Lucas*, 462 U.S. 367 (1983), that congressional enactment of a comprehensive civil service scheme precluded an implied *Bivens*-type cause of action, should be extended to section 1983 actions. Because ANG oper-

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is irrelevant, however, because "that status does not inform us whether those injuring him [them] acted under color of state or federal law." Lasher v. Shafer, 460 F.2d 343, 347 (3d Cir. 1972).

5. "(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

. . .

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned."

ates pursuant to a comprehensive legislative scheme, appellants argue, a section 1983 remedy is inappropriate.[6]

Appellees rejoin that the state is so heavily involved in the National Guard program that the actions complained of were under color of state law. Their argument focuses on the Guard's actual administrative authority at the state level. The governor is the commander-in-chief of each Guard unit and the adjutant general, a state officer, is the chief acting executive. Appellees' discharge was effected by Adjutant General Menard; the other appellants worked under Menard. Appellees also observe that while the other appellants are federal employees, they had to maintain their rank in the state guard in order to maintain their employment as federal technicians and thus be in the position to discharge appellees.[7]

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6. In their amicus briefs, the Adjutant Generals Association of the United States, and the State of California and Adjutant General of the California National Guard argue that because of the Guard's critical role in the United States' national defense, its disciplinary proceedings should be immune from review in the courts. *See* Chappell v. Wallace, 462 U.S. 296 (1983). Feres v. United States, 340 U.S. 135 (1950). We do not reach the issue of military immunity, which appellants did not brief, because it is not part of the question certified by the district court. *Cf.* Ungar v. Dunkin, 531 F.2d 1211, 1215-16 nn. 4&5. (1976).

7. In Johnson v. Orr, 776 F.2d 75 (3d Cir. 1985), the requirement that technicians retain their state membership defeated Johnson's claim for reinstatement. Despite our holding that Johnson was improperly discharged, we found him ineligible for reinstatement because he had left the New Jersey Guard.

III.

The "under color of state law" requirement is identical to the "state action" requirement of the fourteenth amendment. *Lugar v. Edmonson Oil Co. Inc.*, 457 U.S. 922 (1982). *Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) Thus, a showing that actions were "under color of state law," like a showing of the presence of "state action," does not require that the challenged action be pursuant to a state statute. Rather, the question is "whether there is a sufficinetly close nexus between the State and the challenged action." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974), or whether the state "has so far insinuated itself into a position of interdependence" that there is a "symbiotic relationship" between the actor and the state such that the challenged action can "fairly be attributed to the state." *Krynicky, supra*, at 99.

There is no set formula for determining whether the employees of an agency with both state and federal characteristics act under color of state law. All of the circumstances must be examined to consider whether the actions complained of were sufficiently linked to the state. *See Lake Country Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). A crucial inquiry is "whether day-to-day operations are supervised by the Federal [or state] government." *Detore v. Local 245 Jersey City Public Employers Union*, 615 F.2d 980, 983 (3d Cir. 1980) (quoting *United States v. Orleans*, 425 U.S. 807, 815 (1976)).

While the National Guard's hybrid status complicates this inquiry, we have strong guidance from our opinion in *Lasher v. Shafer*, 460 F.2d 343 (3d Cir. 1972), which involved facts strikingly similar to the facts of this case. In

Lasher, National Guard technicians alleged that they had been demoted and abused by their supervisors because of their active union involvement. We concluded that defendants had acted under color of state law. We noted that the Pennsylvania National Guard is part of the state militia,[8] that the Pennsylvania Governor is commander-in-chief of the Guard, and that defendants had not been called into service of the United States at the time of the actions complained of. *Id.* at 346. Moreover, we explicitly rejected the argument, stressed by appellants in the instant case, that because the source of the National Guard's authority is federal, even actions administered at the state level were not under the color of state law. *Id.* at 348.

Lasher does not control this case because it concerned events that occurred prior to the National Guard Technicians Act of 1968. Although the 1968 Act had been passed by the time of the opinion, we explicitly refused to address whether the conclusion that National Guard personnel acted under the color of state laws was altered by the 1968 Act. Therefore, we must make that determination in this case.

The 1968 Act, *inter alia,* made National Guard technicians, who had been state "caretakers" under the previous statute, federal employees. The fact that the Act conferred federal employee status on appellees is irrelevant to the issue of whether those who discharged them acted under color of state law. *See supra* note 4. The 1968 Act also made appellants, with the exception of Adjutant General

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8. *See also* Engblom v. Carey, 522 F.Supp. 57, 65 (S.D. N.Y. 1981). "[T]he Guard is the modern day successor to the Militia reserved to the states by Art. 1, § 8 cls. 15, 16 of the Constitution. . ."

Menard, federal employees; this too is not dispositive because the critical inquiry remains whether their actions were made possible by authority derived from the state. *See Rowe v. State of Tennessee,* 609 F.2d 259, 263 (6th Cir. 1977) (explicitly rejecting the claim that "since as National Guard technicians they are federal employees, their disciplinary or retaliatory actions against Rowe were likewise under color of federal law.")

The crucial question is whether the 1968 Act was either intended to render, or had the effect of rendering the National Guard more federal in character to the point where technician supervisory personnel and the adjutant general can no longer be considered as acting under color of state law when participating in personnel decisions resulting in the discharge of ANG techicians. This question has been considered by the Fifth and Sixth Circuits, both of which have held that the 1968 Act was not designed to federalize the National Guard, and that guard officials may be sued under section 1983. *Rowe v. State of Tennessee,* 609 F.2d 259 (6th Cir. 1979); *NeSmith v. Fulton,* 615 F.2d 196 (5th 1979). *See also Schultz v. Wellman,* 717 F.2d 301 (6th Cir. 1983) (following *Rowe*);[9] *Bollen v. National Guard Bureau,*

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9. Appellants claim that the Fifth and Sixth Circuit cases are distinguishable from the instant case. They attempt to distinguish *NeSmith* and *Shultz* on the grounds that plaintiffs in those cases were discharged from their military positions in the state unit as well as from their positions as federal employees. However, as we noted in *Lasher,* the employee status of plaintiffs has no bearing on whether those injuring them acted under color of state law. 460 F.2d at 347 (3d Cir. 1972). *See supra* note 4.

In *Rowe,* plaintiff, like appellees in the instant case, was dismissed only from his position as a technician. Appellants

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449 F. Supp. 343, 349 (W.D. Pa. 1978) (following *Lasher* without discussing the 1968 Act); *Syrek v. Pennsylvania Air National Guard*, 371 F. Supp. 1349 (W.D. Pa. 1974) (following *Lasher* after explicitly finding that the 1968 Act did not federalize the Guard), *rev'd on other grounds*, 537 F.2d 66 (3d Cir. 1976); *contra Vargas v. Chardon*, 405 F. Supp. 1348, 1351 (D.P.R. 1975) (holding adjutant general not liable under section 1983 without discussing the 1968 Act).

The legislative history of the 1968 Act explicitly reveals the several purposes of that Act; federalizing the Guard's administration was not among them. The House Report unequivocally stated Congress' goals in passing the Act:

> In authorizing federal employee status for the National Guard technicians, the purpose of this legislation is—

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argue that *Rowe* is distinguishable because the plaintiff in that case alleged a campaign of harrassment by both his military and his civilian supervisors. The *Rowe* court, however, quite clearly held that civilian supervisors could be liable under section 1983. The court first concluded that plaintiff's military and joint military/civilian supervisors, including the adjutant general, could act under color of state law. It proceeded to hold that civilian technicians also acted under color of state law if they acted pursuant to their supervisory authority over plaintiff. The court remanded the case, in part for a determination whether the challenged actions were made possible by defendants' official power or were mere private acts of harrassment. In the instant case, it is unquestionable that appellants' actions were pursuant to their official authority.

The dissent downplays the significance of *Rowe* by asserting that "the *Rowe* court was strongly influenced by *Lasher* . . . which dealt with the National Guard before the 1968 amendment." Dis. Op. at 10. In fact, the *Rowe* court explicitly considered (and rejected) the possibility that that 1968 Act undercut the rationale in *Lasher*. 609 F.2d 264.

> (a) [t]o provide a retirement and fringe benefit program which will be both uniform and adequate;
>
> (b) [t]o *recognize* the military requirements and the *State characteristics of the National Guard* by providing for certain statutory administrative authority at the state level with respect to the technician program. (emphasis added)
>
> (c) [t]o clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions, especially on the matter of whether technicians are covered under the Federal Tort Claims Act regarding third party actions against the U.S. Government.

H.R. Rep. No. 1823, 90th Cong., 2d Sess. (1968) *reprinted in* 1968 U.S. Code Cong. & Ad. News 3318, 3319.

A more express statement of congressional objectives could not be asked for, and none of these objectives suggests that Congress intended to reduce the state involvement in the Guard. Two of the goals—providing technicians with a uniform and adequate fringe benefit program and clarifying the status of Guard technicians for the purpose of the Federal Tort Claims Act—are irrelevant to whether technician supervisory personnel and the adjutant general act under color of state law. The third goal, to "recognize the State characteristics of the National Guard," casts the most light on the question of state action. In explaining the provisions about adjutant generals, for example, the House Report said:

> This requirement is intended to achieve two purposes:
>
> a) recognize the State character of the Guard and b) meet the requirement of giving the adjutants general

(who are State officers) the statutory function of employing Federal Employees.[10]

Id. at 3330. Under the 1968 Act, each Guard unit remained under the administration of the adjutant general. Significantly, he remained a state official under the Act. In the case at bar, the other defendants were subordinates of the adjutant general; his authority was needed to consummate their efforts to discharge appellees.

In short, we agree with the Fifth and Sixth Circuits that the 1968 Act left the Guard's administrative authority largely at the state level. The Guard has historically been a matter of intense interest on the state level and the state Guards have zealously fought to prevent federal encroachment. *See generally* M. Derthick, *The National Guard In Politics* (1965). Congress was apparently sensitive to this situation and elected to preserve the state administrative authority over the guard. We are cognizant of the Guard's importance in the national military structure, *see supra* note 6. It is for Congress, however, not the courts, to establish the nature of the Guard. In 1968 Congress addressed the nature of the Guard and elected not to make the Guard's administration more federal in character. Accordingly, we see nothing that permits, much less compels us to depart from our holding in *Lasher*. *See Syrek v. Pennsylvania Air National Guard*, 371 F. Supp. 1349, 1351 (W.D. Pa. 1974) ("After a review of the amended statute and its legislative history we do not think the amendment alters either the

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10. It is worth noting that the original House version of the Bill designated the State Adjutant General "or other appropriate persons" to administer the technicians program. The Senate version, deleted "or other appropriate persons" to ensure that the program would remain under state control. 114 *Cong. Rec.* H24709 (daily ed. August 1, 1968).

logic or the holding of Lasher . . ."), *rev'd on other grounds*, 537 F.2d 66 (3d Cir. 1976).

The dissent acknowledges the state's heavy involvement in the Guard program. It argues, however, that focusing on the particular challenged action—the discharge of appellees—compels the conclusion that appellants acted exclusively under color of federal law. This argument rests on the fact that, in administering the technician program generally and in his authority to dismiss technicians specifically, the adjutant general acts as an agent of the Secretary of the Air Force, 32 U.S.C. § 709 (c),(e)(3)(1982).

We cannot accept this argument; while the adjutant general acted as a federal agent in dismissing appellants, *see Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir. 1974), (adjutant general is federal agent for purposes of jurisdiction under 28 U.S.C. § 1361), it does not follow that his actions were done exclusively under color of federal law.[11] The dissent recognizes that "Congress in the main permitted administrative control of the Guard to remain at the state level where "personnel matters for civilian technicians" are concerned. Dis. Op. at 9. Control over technician personnel matters, however, *was* left at the state level by Congress The dissent does not dispute that the adjutant general, a state officer, retains the discretion to determine when technicians are to be discharged as well as the auther-

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11. In Nesmith v. Fulton, 615 F.2d 196 (5th Cir. 1980), the Fifth Circuit adopted our conclusion in *Chaudion* that the adjutant general was a federal agent for jurisdictional purposes, but nevertheless held that he acted under color of state law in discharging technicians. Indeed, the *Nesmith* court stated that defendants had acted under color of federal as well as state law. *Id.* at 200-01 n.7.

ity to discharge them. Nor does it deny that, in the instant case, the adjutant general made and implemented the final decision to discharge appellees. The adjutant general's actions involved precisely the kind of administrative control over Guard personnel that Congress purposely left at the state level, *see supra* 12-14, not an "intentional deviation from the federal path," *Ellis v. Blum*, 643 F.2d 68, 83 n. 17 (2d Cir. 1981).

The adjutant general's authority to dismiss technicians must be exercised pursuant to federal regulations. To infer from this fact that state action is absent, however, is far too great a leap. It rests on the erroneous assumption that the ultimate statutory source of authority is the sole inquiry for determining whether actions are under color of state law. *See supra* note 12. In fact, all of the circumstances surrounding the challenged action must be taken into account. *See Lake Country Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Askew v. Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976).[12] Here, when

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12. The dissent erroneously asserts that *Askew* supports its position. The court in *Askew* found that municipal police officers involved in a federal investigation had not acted under color of state law. It did so, however, only because the "totality of the circumstances" surrounding the challenged operation showed that it was controlled by the federal authorities. 548 F.2d at 677. Here, the totality of the circumstances suggest that the real authority to discharge technicians is at the state level. Indeed, it is probable that the provisions making the adjutant general's authority over the technician program pursuant to federal regulations were primarily a means of clarifying the permissibility of a state official employing federal employees. It is certainly not the case that the adjutant general acts as an "agent" to the Secretary of the Air Force in the sense of carrying out his commands. On the contrary, as noted, the actual decision to discharge technicians, and the implementation of that decision, is made by the adjutant general.

all of the circumstances are considered, the state action requirement is clearly met. *See Rowe v. State of Tennessee*, 609 F.2d at 264 ("It strains belief to think that the decision to discharge an individual technician was not within the statutory administrative authority at the state level.").

IV.

The dissent argues that the 1968 Technicians Act preempts relief under section 1983. As the dissent notes, the Supreme Court has found certain remedies to preclude section 1983 actions—but only when it found that Congress clearly intended for such remedies to be exclusive. *See, e.g., Middlesex City Sewerage Authority v. National Sea Clammers*, 453 U.S. 1 (1981) (Federal Water Pollution Control Act intended as exclusive remedy); *Smith v. Robinson*, — U.S. —, 104 U.S. 2457 (1984) (Education of the Handicapped Act intended as exclusive remedy); *Great American Federal S & L Ass'n v. Novotny*, 442 U.S. 366 (1979) (Title VII intended as exclusive remedy).[13] We cannot infer from the 1968 Act that Congress wished to foreclose a section 1983 suit by Guard technicians.

The dissent finds evidence of Congress' intent to make the 1968 Act the exclusive remedy for Guard technicians in the prefatory language of section 709(e) that "Notwithstanding any other provision of law . . . " the terms of the Act are to apply. This language, however, establishes only that the terms section 709(e) may not be preempted

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13. Indeed, in *Novotny* the Court clarified that its holding did not overturn the many cases where "we have held that substantive rights conferred in the 19th Century were not withdrawn, *sub silentio*, by the subsequent passage of the modern statutes." 442 U.S. at 377.

by other statutes, not that the Act provides the exclusive remedy for Guard technicians. That is, Congress clearly intended that in a conflict between section 709(e) and another statute, the terms of section 709(e) must be followed. It may be, however, that statutes which do not conflict with the 1968 Act may supplement its terms. For this reason, we disagree with the dissent's view that our holding in *New Jersey Air National Guard v. Federal Labor Relations Authority,* 677 F.2d 276 (3d Cir. 1982) suggests that the 1968 Act provides the exclusive remedy for Guard technicians.

In that case we were faced with a direct conflict between the Federal Labor Management Act (FLMA) and the Technicians Act, *i.e.,* "whether the Technicians Act continues to prohibit appeals from certain decisions of the state adjutant general despite the provisions of the Labor-Management Act, which would ordinarily require the establishment of procedures for such appeals." *Id.* at 281. Faced with this conflict we held that "section 709(e) must be read to override any *conflicting provisions of law* in existence at the time that the Technicians Act was enacted." *Id.* at 283. (emphasis added). The case at bar does not present such a conflict between two statutes. Allowing appellees a section 1983 remedy does not conflict with any terms of the 1968 Act;[14] The Guard's internal administra-

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14. Section 709(e)(5) says "a right of appeal . . . shall not extend beyond the adjutant general of the jurisdiction concerned." That provision precludes further administrative appeals, not court review of the Guard's actions. New Jersey Air National Guard v. Federal Labor Relations Authority, 677 F.2d 276, 280 n. 3 (3d Cir. 1982).

tive processes, as established by the 1968 act, remain intact "notwithstanding" the bringing of a section 1983 action.

We must also reject the dissent's argument that the "comprehensive" nature of the 1968 Act suggests that Congress intended it as an exclusive remedial scheme. The statute that preceded the 1968 Act was anything but a comprehensive remedial scheme: it was limited to technical aspects of the technician program such as the sources of funding of the Guard. The 1968 Act amended the earlier statute to make Guard technicians federal employees, primarily in order to clarify their status with respect to retirement benefits and the Federal Tort Claims Act. *See supra* 12-14. Congress also took the opportunity to establish certain internal administrative procedures of the Guard. 32 U.S.C. § 709(e). The context in which the 1968 Act was passed suggests that the provisions establishing a "remedial scheme" were designed merely to clarify the internal procedures and authority of the Guard in the wake of the technicians' new status as federal employees. There is no evidence in the legislative history that Congress was crafting a comprehensive remedial scheme intended to preclude other remedies available to technicians.[15] Indeed,

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15. The dissent makes much of the fact that section 709(f) makes certain provisions of other civil service legislation inapplicable to Guard technicians. The dissent attaches particular significance to the fact that section 709(f) renders Section 7512 of Title 5 inapplicable to Guard technicians. Since Section 7512 establishes the procedures involved in adverse actions against federal employees, the dissent concludes that Congress intended the procedures described in section 709 as the exclusive channel for technician appeals.

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congressional discussion of the statute is almost entirely bereft of reference to either section 709(e) specifically or the statute's role in creating a "remedial scheme" generally.

Thus the 1968 Act is on a very different footing from the statutes at issue in *Sea Clammers, Novotny,* and *Robinson;* the Federal Water Pollution Control Act, Title VII of the Civil Rights Act of 1964, and the Education of the Handicapped Act, respectively. In each of those instances, the legislation represented Congress' effort to deal with a pressing national problem in a comprehensive manner. The statutes were voluminous and detailed. They had particular provisions explaining the remedies available to classes of plaintiffs, and detailing the circumstances under which aggrieved parties could pursue their rights in state or federal courts. By contrast, the 1968 Technicians Act did not address a pressing national problem, nor did it involve comprehensive reform. Rather, it clarified an internal administrative procedure by which discharged

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On the contrary, section 709(f) buttresses our view that the provisions of section 709 that establish a remedial scheme represent Congress' effort to clarify the administrative implications of making technicians federal employees. As guard technicians are anomalous federal employees in that their employment is administered at the state level. Congress apparently thought that the procedural avenues generally followed in cases involving federal employees were inappropriate. This decision concerned the internal administrative procedure of the Guard: it casts no light on what judicial remedies may be available to Guard technicians. Moreover, little significance can be read into Congress exempting technicians from the comprehensive remedies of the Civil Service Reform Act which was enacted 10 years after Congress exempted technicians from the coverage of section 7512.

employees could pursue their grievances. Given section 1983's critical historical role in vindicating constitutional rights, we should not lightly infer that such a statute as the Technicians Act was intended to displace it.[16]

The dissent suggests that courts should "refrain from interfering" with congressional policy. Dis. Op. at 18. We agree, but we do not agree that our unwillingness to prevent appellees from bringing a section 1983 action constitutes interference with Congress. On the contrary, our holding adheres to the policy of judicial deference set forth by the Supreme Court in the *Sea Clammers* line of cases, *i.e.*, ruling out certain remedies only when it can be clearly inferred that Congress intended their preemption. We simply cannot draw that inference from legislation that amended a technical statute primarily to clarify the employment status of Guard technicians. The fact that the Act included a provision governing the internal administrative procedures to be followed when technicians are discharged does not justify the conclusion that Con-

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16. It is true that the Guard's actions are reviewable agency actions under the APA. The dissent suggests that appellees' remedies under the APA are adequate to redress their grievances, and, therefore, a section 1983 action is inappropriate. We reiterate that absent clear evidence of Congress' intent, it is not for the courts to pick and chose among a party's available remedies. In any event, while the dissent characterizes the APA and section 1983 as "roughly parallel remedies." Dis. Op. n. 4, punitive damages are available only in actions brought under the latter. *See* Carlson v. Green, 446 U.S. 14, 22 (1980) ("[P]unitive damages are available in a proper § 1983 action").

gress intended it as the sole remedy for Guard technicians.[17]

V.

For the reasons discussed above, we hold that appellants acted under color of state law in participating in per-

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17. Appellant's analogy between this case and Bush v. Lucas, 462 U.S. 367 (1983) is flawed. In *Bush*, the Court considered it inappropriate to imply a *Biven*-type cause of action for a federal employee against his employer because congressional enactment of a comprehensive civil service scheme was a "special factor counselling hesitation" to imply the requested remedy. *Id.* at 390. The Court characterized the issue as follows: "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the *creation of a new judicial remedy.*" *Id.* at 388. (emphasis added). We have already seen that this case does not involve an elaborate remedial system. In any event, appellees have not asked us to augment their remedies with "the creation of a new judicial remedy." The court in *Bush* was concerned that permitting a *Bivens* cause of action violated the province of Congress. Here that same deference cautions against denying appellees the *statutory* remedy of section 1983.

We must likewise reject appellants' argument that, in the wake of *Bush*, allowing section 1983 actions against the National Guard "would create technicians as a special class of federal employees" with "remedies for alleged constitutional violation against their supervisors." (appellants' brief at 20). National Guard technicians, like everyone else, may bring a section 1983 against those who violate their constitutional rights while acting under color of state law. Our decision today does not create a special class of federal employees. Guard technicians are "special," in the sense that some remedies may be available to them that are not available to other federal employees, only because of the hybrid status of the guard. To be sure, the blessing is a mixed one: Guard technicians are also rare federal employees who can be *liable* under section 1983. *See* Rowe v. State of Tennessee, 609 F.2d 259 (6th Cir. 1979).

sonnel decisions resulting in the discharge of appellees. As we cannot infer congressional intent to preclude Guard technicians from bringing section 1983 actions against their superiors, we will affirm the district court's decision that appellees may maintain a cause of action against appellants under section 1983.

ROSENN, *Circuit Judge*, dissenting.

I respectfully dissent on two separate and independent grounds.

First, I cannot agree that a state official who is a designated agent of the federal government acts under color of state law when he discharges a federal employee. Second, I do not believe that Congress ever intended to make the remedies of section 1983 available to aggrieved federal employees where Congress has specifically designed a comprehensive system of remedies for them by which grievances can be pursued and, as in this instance, the termination of federal employment successfully challenged. *See Johnson v. Orr*, 776 F.2d 75 (3d Cir. 1985).

I.

The plaintiffs, Johnson and Sheller, were employed by the New Jersey Air National Guard (ANG or the Guard) as civilian technicians. Specifically, they had been employed as aircraft mechanics on the night shift at the ANG 108th Tactical Fighter Wing at the McGuire Air Force Base (Tactical Wing) and served also as stewards for the technicians' union, Local 377 of the American Federation of Government Employees.

Congress authorized the employment of civilian technicians to perform services under the National Guard Technicians Act of 1968, 32 U.S.C. § 709 (1982) (the Act). Prior to the 1968 amendments, technicians were persons who cared for material, armament, and equipment of the Army and Air National Guard. 32 U.S.C. § 709(d) unequivocally converted the technicians into federal employees.[1] In summarizing the major provisions of the Act, Congressman Bray of Indiana, who played a role in the development of the legislation, explained that one of the provisions converted national guard technicians to federal employee status and another required "adjutants general to be the sole agent for employment and administration of the technician program under regulations prescribed by the Secretary concerned." 114 Cong. Rec. H24709 (daily ed. August 1, 1968) (statement of Rep. Bray). He further explained that "[t]hese employees have their salaries paid in full by the Federal Government and must meet all the mental and physical standards as well as professional qualifications prescribed by the military department." *Id.* The Act also provided that in the case of the technicians assigned to perform operational duties at air defense sites, the Secretary of the Air Force may prescribe their hours of duties and their rates of basic and additional compensation. 32 U.S.C. § 709(g)(1). The scheme of the Act authorizes the Secretary concerned "to designate the adjutants general [of each State, the

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1. The pertinent provision of section (d) provides:

> A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States.

Territories, and the District of Columbia] to employ and administer the technicians authorized . . .", 32 U.S.C. § 709(c), and empowers them to separate technicians from employment for cause. 32 U.S.C. § 709(e)(3).

In the instant case, the majority acknowledges that the plaintiffs here were "federal employees" at the time of their discharge. Maj. op. 11. The majority does not consider this dispositive, and standing alone it may not be, although it is significant. The crucial question, as stated by the majority, is whether the Act "was either intended to render," or effectively rendered the National Guard "more federal in character to the point where technician supervisory personnel and the adjutant general can no longer be considered as acting under color of state law when participating in personnel decisions resulting in the discharge of ANG technicians." Maj. op 11. I disagree that this is the crucial question. I believe the question is: did the State of New Jersey play any part in the challenged personnel action — the termination of the plaintiffs' employment as technicians in the ANG?

Because the technicians were federal employees, the State did not pay their salaries, prescribe their duties, or have the power to discharge them. Only their employer could have fulfilled this role, not the State. Accordingly, Congress, by statute, specifically provided that the adjutant general could separate technicians from employment. 32 U.S.C. § 709 (e)(3). We have therefore held that at least for purposes of mandamus jurisdiction, "there can be no doubt" that the adjutant general of the State, although he has not been called into active service, "is an agency or an agent of the United States." *Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir. 1974).

Thus, regardless of the hybrid character of the National Guard, the State played no part in the plaintiffs' separation from employment. Although the adjutant general, unlike the technicians, retained his status under the Act as a state official and was the chief acting executive of the ANG, his power to terminate civilian technicians stemmed only from his designated statutory authority to act as a federal agent. "The mere fact that the federal agents happen to be state officials does not, without more, convert every intentional deviation from the federal path into an action under color of state law." *Ellis v. Blum*, 643 F.2d 68, 83 n.17 (2d Cir. 1981).

It is not unusual in modern society, and especially in state government, for a versatile person to serve in two capacities or wear "two hats." For example, the Secretary of Health and Human Resources regularly enters into agreements with state agencies delegating authority to them to make initial determinations as to eligibility for social security disability benefits. *See Ellis v. Blum*, 643 F.2d at 70, 83 n.17. State or municipal police officers are at times assigned to federal investigations, and for that limited purpose act under color of federal law, even though for other purposes they remain accountable to their respective hiring employers. *See Askew v. Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976). It is not uncommon for truck drivers hired by one employer to be assigned, along with the original employer's truck, to another employer under a lease agreement. For the purpose of the bailment, the truck driver is considered the employee of the lessee although the driver may otherwise be accountable to his original employer.

Therefore, it is essential that we should look at the capacity in which the official is acting and the character of the act in question. Accordingly, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Court focused on the specific conduct challenged. The Court there held that despite the state licensing scheme for private clubs engaged in the sale of liquor, and the comprehensive regulations imposed by the Pennsylvania Liquor Control Board upon them, "the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board [did] not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter state action within the meaning of the Equal Protection Clause of the fourteenth amendment." *Id.* at 177.

Therefore, the question whether "state action" is present or absent does not require examination of the overall nature of the organization involved or the overall regulatory scheme brought to bear upon it, but of the character of the specific conduct that is challenged. In this case, the action challenged is the termination of employment. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the action challenged was the termination of service to a consumer by a regulated utility company. Even assuming that the State had conferred monopoly status on the utility, a point advanced by the plaintiff, the Court held that merely because

> a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as is in the case of most utilities, do so . . . . [T]he inquiry

> must be whether there is a sufficiently close nexus between the State and the *challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Id. at 350-51 (emphasis added, citation omitted).

In the instant case, the State had no involvement in the plaintiffs' discharge: the State was not their employer. The adjutant general in discharging them acted solely in behalf of the Air Force Secretary, his designated superior for this purpose. Although the ANG by its very structure and purpose has numerous ties to the State, it depends for technician manpower vitality upon the federal government. An essential link in the maintenance of that vitality is the adjutant general, who has federal statutory authority to hire, pay, supervise, and terminate the National Guard civilian technicians. When he acts in this capacity, including the exercise of his authority and discretion to discharge, he acts under color of federal and not state law.

The majority reaches its result by relying for "strong guidance" on our opinion in *Lasher v. Shafer*, 460 F.2d 343 (3d Cir. 1972). As Judge Gibbons, the opinion writer in that case, noted, the legislation under which the appellant was disciplined in that case was "substantially amended" by the Technician Act of 1968. *Id.* at 346, n.4. The amendments, as I have related above, converted the "caretaker" status of the technicians into a federal employment relationship. Lasher's status as an employee may not have been relevant in this case, but the plaintiffs' status is germane in this case because, under the 1968 amendments, only a federal agency or federal agent could effectuate their discharge.

Furthermore, we decided *Lasher* two years before the Court's pronouncement in *Jackson v. Metropolitan Edison Co.*, which maintained that courts should focus on the specific act at issue. In contradistinction from this case, where the appellants acted in their capacities as technicians, the court in *Lasher* did not see "how the acts alleged in the complaint, if they occurred, were in any way related to the care of the entrusted federal property. The acts complained of . . . were done in the capacity of member or employee of the Commonwealth militia, and in pursuit of that militia's perceived interests." *Id.* at 347. Thus *Lasher* did not address a case where the act at issue constitutes a duty assigned by federal law to a federal agent. That is precisely the situation here where the amendments of 1968 have transformed what was a loose funding relationship under the former Caretaker Program into one in which the adjutant general is a statutorily designated federal agent with authority over federal employees. Although as the majority states, the adjutants general remained state officials under the Act, Maj. Op. 4, the Act indeed changed their status with respect to hiring, paying, prescribing duties, and discharging civilian technicians by making them full federal agents for such purposes.

In *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981), the court held that state social service officials who administer the federal Socety Security Act under federal authority did not act under color of state law for purposes of section 1983. *Id.* at 83. The court noted, as referred to above, that in performing the challenged act (making eligibility determinations for social security disability benefits), the officials acted under federal authority. Id. at 83 n.17.

The *Askew* court held that St. Louis police officers assigned to a federal investigation acted under color of federal law. The plaintiff argued that the officers were "dual-status" agents acting concurrently under state and federal law. The officers remained accountable to the St. Louis Police Department (SLPD). They were paid, however, by the federal government through checks issued by the SLPD, were subject to the immediate control of federal officials, and were covered by the Federal Employees Compensation Act for injuries suffered while on assignment. Holding that the officers' ties with the federal government stamped their role in the challenged conduct as federal and not state, the court asserted that these facts

> cast an indelibly federal hue upon the activities of these agents, even though they maintained official links with the SLPD. Furthermore, the totality of the circumstances surrounding the alleged raid out of which plaintiff's § 1983 claim arises clearly shows that these agents were acting pursuant to federal authority and not under color of any state law.

Askew, 548 F.2d at 677.

The *Askew* court focused on the act at issue, not on the broader relationship between the police officers and the SLPD. It noted that the St. Louis officers participated in a raid in Illinois, and therefore could have acted only in their capacity as federal agents. *Id.* Just as the St. Louis officers could not operate in Illinois in their capacity as state officials, so the New Jersey Adjutant General could not terminate federal employees in his capacity as a state official.

I therefore disagree with the holdings of the Fifth and Sixth Circuits in *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir.

1980), and *Rowe v. Tennessee,* 609 F.2d 259 (6th Cir. 1979), both cited by the majority. These courts held that adjutants general, in terminating civilian technicians, act under color of State law. *NeSmith* relied chiefly on a statement in the legislative history that authority over the Technician Program would remain "as a matter of law . . . at the state level." *Id.* at 200 (quoting H. Rep. No. 1823, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Ad. News 3324). A careful reading of the Report reveals only that technicians "will be subject to certain supervisory controls at the State level which would not apply in the case of the typical civil service employees." 1968 U.S. Code Cong. & Ad. News 3324. Contrary to the *NeSmith* court's assumption, this statement does not answer the "color of state law" question. Although Congress in the main permitted administrative control of the Guard to remain at the state level, it deliberately separated personnel matters for civilian technicians and delegated them to the Secretary of the Army or Air Force as the case may be. The adjutants general remain state officials, as I have already alluded, but for purposes of terminating civilian technicians, they can act only under federal authority. The *NeSmith* and *Rowe* courts failed to see this distinction; they did not focus on the act of termination that was being challenged. In addition, the *Rowe* court was strongly influenced by the decision in *Lasher, supra* at 8-9, which dealt with the National Guard before the 1968 amendment. 609 F.2d at 264.

Rowe also relied on a policy rationale that is no longer valid. The court explained that it sought to provide a complete scheme of remedies for constitutional violations, whether committed under color of federal or state law. *Rowe,* 609 F.2d at 264-65. This complete scheme would

comprise the complementary remedies of *Bivens* suits and section 1983 actions, respectively. *Id.* However, *Bush v. Lucas*, 462 U.S. 367 (1982), decided since *Rowe*, and discussed infra at 20-22, rejects this rationale.

I would therefore hold that the New Jersey Adjutant General did not act under color of state law when he terminated the plaintiffs.

II.

Even assuming the presence of state action, perhaps a more compelling reason for denying relief under section 1983 is that Congress intended to make remedies to aggrieved civilian technicians available only under the 1968 amendments. I base this statement on two grounds: (1) prefatory language in the Act, and (2) the comprehensive system Congress designed in the Act by which technicians could pursue grievances arising out of termination of their employment. In this instance, the plaintiffs took advantage of that system and appealed to the district court under the provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 (1982), and ultimately to this court. We affirmed the grant of summary judgment in favor of the plaintiffs on their due process claims. *Johnson v. Orr*, 776 F.2d 75 (3d Cir. 1985).[2]

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2. Although the district court's grant of summary judgment reversed the plaintiffs' termination of employment and transferred their claims for back pay to the United States Court of Claims, it did not order reinstatement because they no longer satisfied the federal statutory requirement for civilian technicians. Sheller had resigned from the National Guard and Johnson had transferred his military service to the Pennsylvania Air National Guard.

A.

The language of the Technicians Act expressly preempts relief under earlier statutes. The preface to section 709(e) of the Act provides that its terms shall apply "[n]otwithstanding any other provision of law . . . ." We interpreted this language in *New Jersey Air National Guard v. Federal Labor Relations Authority*, 677 F.2d 276 (3d Cir. 1982), as overriding all other statutory remedies. The question in the case was whether ANG was obligated to bargain over certain conditions of employment. One issue in contention was whether there should be a procedure, consisting of binding arbitration, by which an aggrieved employer could challenge an adverse disciplinary procedure. The court had before it the construction of the Technicians Act of 1968 and conflicting provisions of the Federal Labor Management Act enacted ten years later. The court had no difficulty in construing the preclusive effect of section 709(e) of the 1968 Act as overriding all prior statutory remedies. "A clearer statement is difficult to imagine: section 709(e) must be read to override any conflicting provision of law in existence at the time that the Technicians Act was enacted." *Id.* at 283. This statement by our court should lead us to hold that section 1983 actions are unavailable to civilian technicians employed under the Act.

B.

Setting aside the preface to section 709(e) of the Act, analyses of section 1983 and of the Technicians Act disclose that relief under section 1983 in this context is unnecessary and inappropriate. Congress enacted 42 U.S.C. § 1983 in

response to lawless conditions existing in some states during the period following the Civil War, which rendered life and property insecure and which the states were unwilling or powerless to correct. The legislative history of this act and the statute itself "suggests that the Reconstruction Congress had grave doubts about the reliability of state courts as protectors of federal rights, and thus intended that federal courts exist as fully independent alternatives to state court systems." L. Tribe, *American Constitutional Law*, § 3-41, at 155 (1978). Federal courts, under the Act, were compelled to intervene because the states were not adequately deterring and correcting egregious constitutional violations. Although the legislation had several subordinate purposes, its broad aim "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe v. Pape*, 365 U.S. 167, 174 (1960).

Cognizant of the history and purposes of 42 U.S.C. § 1983, the Court had an opportunity to review the reach of the statute in *Parratt v. Taylor*, 451 U.S. 527 (1980). In that case, a state prisoner sued prison officials under section 1983 for loss of property, claiming a deprivation of due process rights under the fourteenth amendment. Distinguishing the plaintiffs claim from the illegal search and seizure claim in *Monroe v. Pape*, the Court acknowledged the presence of action under color of state law and a deprivation of property. It held, however, that a cause of action would not lie because the deprivation resulted from a random and unauthorized act and because state law afforded the prisoner a post-deprivation remedy. "This procedure was in existence at the time of the loss here in question but [the prisoner] did not use it." *Id.* at 543. Thus,

the Court considered the presence of a remedy available for the violation as significant.

In the instant case as well, plaintiffs had an available remedy. Not only was the remedy handy, but the plaintiffs Johnson and Sheller took full advantage of it. Section 709(e) of the Act provides for separation for cause or separation for failure to continue membership in or specified grade in the National Guard. In the event of termination as a technician, the technician must be given written notice "at least thirty days prior to the termination date of such employment." 32 U.S.C. § 709(e)(6). The Act also provides for a right of appeal to the adjutant general.[3] The plaintiffs utilized the appeal procedure set forth in the Act and then exercised their right to proceed with an action against their employer under the Administrative Procedure Act (APA). They sued for reinstatement under the APA and the courts found their terminations to be contrary to law.[4] *Johnson v. Orr*, 776 F.2d at 82-83. In addition, plain-

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3. Technician Personnel Manual 753, promulgated by the National Guard Bureau, details the appellate process that each adjutant general must afford his jurisdiction's technicians. See Subchapter 4, "Appeals," Subchapter 5, "Conduct of the Hearing," and Appendices A, "Adverse Action Flow Chart," and B, "Sample Notices." In addition, the New Jersey Department of Defense promulgated NJANG Regulation 40-13 to "implement the provisions of the National Guard Bureau Technician Personnel Manual, Technician Personnel Pamphlets, and applicable regulations of the United States Civil Service Commission's Federal Personnel Manual." NJANGR 40-13, chapter 1-1. Chapter 7 "Personnel Relations and Services" further details the appeals process outlined in the Technician Personnel Manual.

4. The APA generally creates a cause of action when a plaintiff alleges that federal officials have violated federal law. 5

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tiff Johnsons' suit for back pay has been transferred to the United States Court of Claims. To impose section 1983 as another layer of protection for technicians is not only supererogatory; it unbalances Congress' carefully crafted National Guard personnel system. It counters a congressional intent that the Technicians Act provide the exclusive avenue of relief for civilian technicians.

Because Congress tailored section 709 to provide the protections it thought best served the goals of the technician program, it established section 709 as the exclusive remedy for technicians. It ensured that they would not have available, as an alternate channel, the grievance procedures generally afforded federal employees. 32 U.S.C. § 709(f) specifically provides that 5 U.S.C. §§ 7511 and 7512, both of which deal with removal and suspension of federal employees, do not apply to technicians. Section 7512 is the provision of the Civil Service Reform Act of 1978 that establishes procedures to be followed in taking adverse actions against federal employees. This legislative scheme demonstrates that Congress intended the procedures provided in the Technicians Act and the APA to serve as the exclusive channel for technician appeals.

The Supreme Court has in recent years refused to allow section 1983 suits where Congress has already crafted a comprehensive remedial scheme to address a specific

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U.S.C. §§ 702, 706 (1982). Chrysler Corp. v. Brown, 441 U.S. 281, 317-18 (1978). Together, section 1938 and the APA form a system of roughly paralellel remedies, the former applying to the states and the latter to the federal government. It is therefore anomalous to grant relief under both statutes for the same alleged wrongful act.

problem. Such comprehensive legislation evinces a congressional intent that such a scheme be exclusive. Support for this view can be found in *Middlesex County Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), where plaintiffs brought suit against the federal government and various state entities and officials alleging, inter alia, violations of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 *et seq.* (1976 ed. and Supp. III), and the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. § 1401, *et seq.* (1976 ed. and Supp. III). The Court addressed the availability to plaintiffs of a section 1983 suit based on the two environmental statutes and the "and laws" provision of section 1983. It held that a section 1983 suit was precluded because Congress had provided such tailored and comprehensive remedies in the two environmental statutes that it must have intended that those remedies be exclusive.

> When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.
>
> . . . [T]he FWPCA and MPRSA do provide quite comprehensive enforcement mechanisms. It is hard to believe that Congress intended to preserve the § 1983 right to action when it created so many specific statutory remedies . . . . We therefore conclude that the existence of these express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983.

Id. at 20-21 (citations omitted).[5]

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5. The majority acknowledges that 1983 actions are precluded where a comprehensive remedial scheme covering a spe-

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The Court reaffirmed this reasoning in *Smith v. Robinson*, 52 U.S.L.W. 5179 (U.S. June 26, 1984) (No. 82-2120). In *Smith*, parents brought suit on behalf of their handicapped child under, inter alia, the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 *et seq.* (1982), and 42 U.S.C. § 1983. The Court focused on whether the EHA precluded all other avenues of relief. It held that Congress had indeed intended "the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." *Id.* at 5184. As in *Sea Clammers*, the Court inferred this legislative intent from the existence of the specific remedial scheme:

> The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.

Id. at 5184. The Court emphasized that, in light of the "comprehensive nature" of the Act, allowing a handicapped child to go directly to court with an equal protection claim, even though the claims alleged were based on independent constitutional violations rather than violations of the EHA, would render much of the Act superfluous and

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cific area evinces a congressional intent to preclude other remedies. The majority, however, inexplicably chooses not to *infer* such congressional intent from the presence of the specific and comprehensive scheme prescribed by the Technicians Act. Maj. op. at 17-21.

run counter to the congressional view of the best manner of addressing the problem. *Id.* at 5184-85.

The Court concluded its analysis:

> [Section] 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended.
>
> In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme. The legislative history gives no indication that Congress intended such a result. Rather, it indicates that Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education.

Id. at 5185 (citations and footnotes omitted). *See also Guardians Association v. Civil Service Commission of the City of New York,* 463 U.S. 582, 610 n.3 (Powell, J., concurring) ("I also would hold that private actions asserting violations of Title VI may not be brought under 42 U.S.C. § 1983. Congress' creation of an express administrative procedure for remedying violations strongly suggests that it did not intend that Title VI rights be enforced privately either under the statute itself or under § 1983.").

In drafting the Technicians Act, Congress had to consider the twin demands of (1) federal personnel policy, and (2) the military mission and *sui generis* status of the National Guard.[6] Both considerations are within the arena of

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6. The technicians' tasks parallel those of other civilian employees but arise in a distinctly military context and tinge the employment relationship with "significant military concerns." *New Jersey Air National Guard,* 677 F.2d at 279.

congressional expertise and appropriate deference to Congress dictates that courts refrain from interfering.

Limiting National Guard employees to statutorily provided remedies would maintain consistency with judicial policy regarding all federal employees. Courts generally funnel federal employee grievances into systems specifically created for them, rather than allow suits on other theories. For example, as noted in the district court opinion in this case, constitutional claims that are unfair labor practices fall within the exclusive jurisdiction of the FLRA. *See also Purtill v. Harris*, 658 F.2d 134, 137 (3d Cir. 1981) (this court declined to recognize a *Bivens* cause of action because the federal employee was afforded complete and efficient remedy by the Age Discrimination Employment Act).

In *New Jersey National Guard, supra*, we had occasion to address the relationship of the Technicians Act to the Federal Labor Management Act (FLMA) requiring establishment of procedures for grievance appeals. Congress enacted the FLMA ten years after the Technician Act, as distinguished from section 1983, which it adopted approximately one hundred years before in a wholly different context. Nonetheless, we rejected the contention that the FLMA overrode the very provisions of section 709(e) of the Technician Act now before us. We emphasized the specificity of the Technician Act and the logic of noninterference with the system it established.

> A preference for the specific over the general statute makes considerable sense in the situation we confront here. Congress in 1968 turned its attention to the very class of federal employees involved in this dispute. It crafted with care precise provisions intended to

> meet concerns of federalism and military control that are duplicated nowhere else in the federal service. Legislators in 1968 stressed the importance of the provisions in question to the entire scheme of National Guard employment. One can only infer from this narrowly directed activity that Congress, upon consideration of the issue in dispute here — the right of appeal by a Guard technician — decided that very matter, with explicit and specific language, in 1968.

677 F.2d at 285-86. We concluded that, because the FLMA addressed all federal employees, "it appear[ed] inconceivable" that Congress intended it to override the system it had carefully devised in the Technicians Act. *Id.* at 286.

Turning to the instant case, it would appear *a fortiori* that Congress did not intend section 1983 to supplant or even augment the remedies it had established for aggrieved technicians in the 1968 Act. Moreover, section 1983 is separated from its moorings in purpose and time whereas the Technicians Act remains pertinent, pointed and specifically crafted for a unique military organization, specifically providing that the remedies herein provided would apply "[n]otwithstanding any other provision of law." 32 U.S.C. § 709(e). I therefore believe that in the context of this litigation, an additional remedy under section 1983 is impermissible and unwarranted.

C.

Appellants analogize to *Bush v. Lucas,* 462 U.S. 367 (1983), which addressed a confluence of two of the factors discussed above: the wisdom of declining to employ a general remedy to interfere with a specific and comprehensive one, and the disinclination to interfere with congressional enactments concerning federal personnel policy.

The Court in *Bush* addressed the role of *Bivens* actions, a parallel remedy to section 1983 for wrongs committed under color of federal law but without an available statutory remedy. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In allowing *Bivens* actions the Supreme Court created a federal nonstatutory remedy where no other remedy existed. *Id.* at 395-96. In *Bush*, however, the presence of a comprehensive civil service scheme rendered a *Bivens* action inappropriate. *Bush*, 462 U.S. at 368. The Court reasoned that the question was not what remedy should be provided for a wrong that would otherwise go unredressed but "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." Id. at 388.[7]

In this case, the majority rejects the *Bush* rationale. The majority reasons that the separation-of-powers concern that deterred the Court in *Bush* from augmenting a statutory remedy with a judicial one is absent in a case involving section 1983 because it is a statutory action. The majority's language pays homage to the concepts of separation of powers and deference to congressional intent, but its conclusion does not. It overstates the difference between a section 1983 remedy and the judicially created *Bivens* remedy and understates the difference between section 1983 and recently enacted specific legislative remedies.

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7. Appellant alleged a *Bivens* cause of action in the district court. The court, citing *Bush*, dismissed the claim as inappropriate in this context. No appeal was taken from the dismissal.

The majority's statement that section 1983 is a statutory remedy is, of course, correct, but its implied conclusion that it therefore takes precedence over later, more specific, legislation does not necessarily follow. The majority implicitly accepts the fallacious premise that all statutory remedies stand on equal footing. Yet the history, purposes, objectives, and timing of each must be weighed in a search for congressional intent. When one does such weighing, it seems certain that the recently enacted Technicians Act, with its specific remedial factors, negates the broad based legislation addressed to the correction of the disorders and chaos of the Reconstruction period. As we decided in *New Jersey National Guard*, 677 F.2d 286. "A preference for the specific over the general statute makes considerable sense in the situation we confront here." *See supra* at 19.

IV.

In summary, when the adjutant general terminated the plaintiffs as federal employees, he exercised no state authority. He acted only as a statutorily constituted federal agent. In enacting the technicians Act of 1968, Congress structured a statute for the unique military status of the National Guard and its civilian technicians, and forged within its framework comprehensive procedural safeguards. It expressly precluded the application of earlier statutes.

In answer to the certified question of the district court, I would therefore respond that technician supervisory personnel and the adjutant general of the State of New Jersey, when participating in personnel decisions re-

sulting in the dismissal of two technician employees under the authority of the National Guard Technicians Act, were not acting under color of state law for purpose of section 1983. Even if they were, the remedies provided by the Technicians Act are exclusive and preclude a section 1983 action.

I therefore respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 84-5877 and 84-5888

ROY A. JOHNSON and JOHN J. SHELLER

Appellants in No. 84-5877

v.

VERNE ORR, Secretary; FRANCIS GERARD, Major General; WILFRED C. MENARD, JR., Major General; COLONEL JOHN MURPHY; BRIGADIER GENERAL CHARLES YOUNG, Air Commander; LT. COL. BILLY MC DANIELS.

Appellees
Verne Orr, Secretary of the
Air Force, Cross-Appellant
in No. 84-5888

Appeal from the United States District Court
for the District of New Jersey - Trenton
D.C. Civil No. 82-2578

Argued September 10, 1985

Before: SEITZ, BECKER, and ROSENN,
Circuit Judges

Opinion Filed October 31, 1985

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OPINION OF THE COURT

ROSENN, Circuit Judge.

Plaintiffs, Roy A. Johnson and John J. Sheller, formerly employed by the New Jersey Air National Guard (ANG or the Guard) as civilian technicians, were dismissed from employment for alleged labor activities in violation of federal law. The New Jersey Adjutant General who dis-

missed them acted upon a pretermination recommendation of a hearing examiner for the ANG who held that the technicians had indeed violated applicable federal statutes. Plaintiffs appealed under the provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 (1982), to the United States District Court for the District of New Jersey seeking a reversal of the Adjutant General's decision.[1]

The court granted the plaintiffs' motion for summary judgment and entered judgment in their favor under the Administrative Procedure Act against the defendant, Verne Orr, Secretary of the Air Force, in his official capacity. This in effect reversed the terminations of their employment and may support their claims for back pay, claims that have been transferred by the district court to the United States Court of Claims. Secretary Orr timely appealed to this court from the summary judgment. The district court declined to reinstate the plaintiffs to employment, however, because it concluded they no longer satisfied the federal statutory requirement for civil technicians that they also serve as military members of the ANG. They appeal the denial of this motion for reinstatement. We affirm.

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1. The complaint also alleged violations of 42 U.S.C. § 1983 (1982) and sought damages arising out of plaintiffs' dismissal from employment based on a denial of due process and a violation of their first amendment rights. The district court entered summary judgment for the defendants on plaintiffs' due process claims. The court then certified for appeal to this court the question whether the defendants acted "under color of state law" for purposes of 42 U.S.C. § 1983. That appeal is docketed to Nos. 84-5859 and 84-5860 and forms no part of the disposition of this appeal.

I.

Plaintiffs, who had been employed as aircraft mechanics in the night shift at the ANG 108th Tactical Fighter Wing at the McGuire Air Force Base (Tactical Wing), served also as stewards for the technicians' union, Local 377 of the American Federation of Government Employees (the Union). As stewards, their responsibilities included filing grievances on behalf of bargaining-unit members and keeping them advised of matters that might affect their working conditions. In the period immediately preceding plaintiffs' dismissal, the Tactical Wing was in transition from using the older F-105 aircraft to the new F-4D fighter-bomber. The United States Air Force established a schedule that required the Wing to complete its transition by October 1, 1981, and reach combat readiness status by that date. As the combat readiness date approached, Wing Commander General Young foresaw problems meeting the deadline. Complicating matters for him was the Union's request, made the preceding June, that he adjust the technicians' schedules to allow them a three-day Labor Day weekend.

The night shift technicians normally worked Tuesday through Saturday, approximately 2:00 P.M. to 10:30 P.M. In order to satisfy the Union's request for a three-day weekend and also to meet the transition schedule, the ANG allowed the technicians the Saturday of Labor Day weekend as a holiday, and instead required them to work the preceding Monday, August 31, 1981, from 7:30 A.M. to 4:00 P.M. The technicians had no objection to working on Monday, but pointed out that their usual hours whenever they were assigned work on Mondays were 2:00 P.M. to 10:30 P.M. They also asserted that their collective bargaining contract

entitled them to notice two weeks prior to the change to the earlier Monday hours.

On August 26, 1981, several night-shift technicians complained to plaintiff Johnson regarding the Monday schedule. That day, Johnson contacted Colonel Wingert, who dealt with scheduling problems. Colonel Wingert said that he would gather more information and then discuss the matter with Johnson. During a routine break that evening, the night-shift technicians gathered informally and Johnson related this exchange to them. Those present, including plaintiff Sheller, discussed their options, but reached no decision. Plaintiffs promised to seek advice from other union officials. The next day, August 27, Colonel Wingert told Johnson that the agency would require the technicians to work the reassigned shift on Monday. During that evening's authorized break, plaintiffs discussed management's decision with the technicians. Johnson, he so asserted during the ensuing litigation, told the technicians to comply with the revised schedule and promised that the Union would file a grievance and, if necessary, seek arbitration. On the other hand, the ANG claimed that the technicians discussed a number of options for disrupting the work schedule, including refusing to report at the scheduled time, taking unscheduled sick leave, or engaging in slow downs. On August 31, 1981, all night technicians complied with the new schedule and commenced work at 7:30 A.M.

On September 2, 1981, plaintiffs' supervisor, Colonel Murphy, a defendant, notified plaintiffs by letter of a proposal to terminate their employment because they had conducted a prohibited union meeting on official time and had advocated a work slowdown and disruption of the Tactical Wing Mission. Plaintiffs made a detailed reply in writing

to the proposed removal, in essence denying the allegations against them. On October 1, 1981, General Young, Wing Commander, sustained the charges contained in the proposed notice of removal and informed plaintiffs of their right to appeal his decision.

Plaintiffs appealed and Colonel Newman, a hearing examiner for the National Guard Bureau, conducted an administrative hearing. In his written opinion, Newman stated that plaintiffs were "charged with violation of 5 U.S.C. § 7131 by conducting Union business while the employees were in duty status and of 5 U.S.C. § 7116 by calling for and condoning a work slowdown and failing to take action to stop such activity." Newman concluded that plaintiffs had violated both sections and recommended that they be removed from employment as technicians. On January 26, 1982, defendant Menard, as State Adjutant General, implemented Newman's recommendation and discharged Johnson and Sheller.[2]

On August 6, 1982, plaintiffs filed this suit against Menard, Murphy, and Young in their individual capacities and against Verne Orr, Secretary of the Air Force, and Francis Gerard, Chief of Staff of the ANG, in their official capacities. Plaintiffs asserted that defendants acted arbitrarily and capriciously in violation of constitutional and statutory law. They further alleged that the actions in question were in retaliation for plaintiffs' union activi-

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2. Both the Union and the ANG filed charges of unfair labor practice with the Federal Labor Relations Authority (FLRA). The FLRA issued a complaint as to ANG's charges, but for jurisdictional reasons, declined to consider those of the Union.

ties and for their exercise of first amendment rights to freedom of speech and association.

Defendants initially moved to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. The district court, in its opinion of July 8, 1983, denied defendants' motion and ruled that plaintiffs had stated a cognizable claim. The court ruled that it had jurisdiction under the APA to review the decision of the Guard to terminate the plaintiffs.

The court subsequently granted plaintiffs' motion for summary judgment on their APA claim, thereby reversing the decision of the National Guard, and denied the defendants' motion for summary judgment. The court reversed the section 7131 charge for lack of evidence that the employees were on duty status at the time of the meeting. It reversed the section 7116 charge on an error of law: the statute governs activities of unions as organizations and does not address those of individual members. As to plaintiffs' claim of lack of due process, the court found that the notice given them of the charges adequately satisfied constitutional due process requirements. As to plaintiff's first amendment claims, the court found that the examiner's conclusion that required plaintiffs to speak out during discussion of job actions violated their first amendment rights. It did not, however, reinstate plaintiffs. Sheller was no longer a National Guard member, and Johnson resigned from the ANG and joined the Pennsylvania Air National Guard. The district court held that, in order to comply with 32 U.S.C. § 709(b) requiring that technicians also serve as members of the National Guard, a technician must concur-

rently perform civilian and military duties in the same National Guard unit. Thus, the denial of reinstatement constituted a denial of the request for injunctive relief. The grant of plaintiffs' motion for summary judgment under the Administrative Procedure Act in effect granted their request for a declaratory judgment that the defendants had unlawfully terminated plaintiffs' employment.

II.

The parties raise three issues on appeal. First, plaintiffs argue that the ANG denied them due process because it did not provide them with notice of the statutory provisions they had allegedly violated. Second, the Secretary argues that the district court erred when it granted plaintiffs' motion for summary judgment under the APA. Finally, plaintiff Johnson asserts that the district court should have reinstated him to his technician's position. We consider each of these contentions in turn.

A.

Plaintiffs Johnson and Sheller contend that the ANG notice of the pretermination hearing was constitutionally inadequate because it failed to notify them of the precise statutory provisions they had allegedly violated. The letter of Colonel Murphy, notifying plaintiffs of their proposed termination stated that it was "based upon your conducting an unauthorized meeting of technicians on government time and advocating a slowdown of work and disruption of the 108 TFW Mission." The letter further detailed the factual basis underlying these allegations.

Plaintiffs contend that this did not satisfy constitutional requirements of adequate pretermination notice.

Notice must be adequate "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). This court recently explained that "[t]he right to a hearing is certainly of little value without prior notice of the charges presented, in sufficient detail fairly to enable the party charged to demonstrate any error that might exist." *Cohen v. City of Philadelphia*, 736 F.2d 81, 84 (3d Cir. 1984) (quoting *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Mullane*, 339 U.S. at 314), *cert. denied*, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984). *See also Memphis Light & Water Division v. Craft*, 436 U.S. 1, 14 (1978) (purpose of due process is to permit the affected individual to prepare adequately for impending hearing).

In this case, the district court found that Colonel Murphy's letter to the plaintiffs gave adequate notice because it "listed both the alleged facts upon which the defendants were relying and the reasons those facts were felt to be offensive." The plaintiffs' additional complaint, that the Murphy letter misled them because it notified them only that they had advocated illegal acts whereas specification two of the formal charges also alleged that they condoned the advocacy, is of little significance. The factual predicate for the notice and for the charge as recast is the same and the slight variation between the two charges in specification two could not have prejudicially affected the preparation of the defense. Furthermore, the ANG argues that the examiner recast this specification at the request

of plaintiffs' counsel. The Murphy notice for the ANG and plaintiffs' responses (Admin. Record pp. 11-16, 46-48) disclose that plaintiffs thoroughly understood the nature of the charges and they were able adequately to prepare their defense. They knew that their role in the technicians' discussions relative to the shift change was the essence of the charges. Moreover, had insufficient notice hampered plaintiffs' preparation they could have moved at the hearing for a continuance. They did not. Their failure to protest at the hearing strongly indicates that the notice was adequate and they were satisfied with it. The district court properly rejected this contention of the plaintiffs.

B.

The Secretary of the Air Force, in his cross-appeal, argues that the district court erred in granting summary judgment for plaintiffs on their APA claim. The district court granted the summary judgment motion because, it concluded, substantial evidence did not exist to support the hearing examiner's decision. The Administrative Procedure Act requires the reviewing court to set aside those agency actions, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, 5 U.S.C. § 706(2)(A), contrary to constitutional right, 5 U.S.C. § 706(2)(B), in excess of statutory discretion, 5 U.S.C. § 706(2)(C), or unsupported by substantial evidence, 5 U.S.C. § 706(2)(E). *See also Neal v. Secretary of the Navy*, 639 F.2d 1029, 1036-37 (3d Cir. 1981) (the court has power and duty under APA to review actions of Enlisted Performance Board and Board for Correction of Naval Records). Our task is to determine whether the district court erred in its review.

The hearing examiner found against plaintiffs on two grounds. He found that they had violated 5 U.S.C. § 7131 by conducting "Union business on Official Time" and violated 5 U.S.C. § 7116 by condoning the advocacy of a work slowdown. 5 U.S.C. § 7131(b) provides that activities relating to the internal business of a labor organization shall be performed while the employee is on "nonduty" status. The examiner found that plaintiffs violated 5 U.S.C. § 7131 by conducting union business while employees were on duty status. The district court rejected the examiner's finding that the plaintiffs were on duty status during the shift discussions by the technicians. The court concluded that substantial evidence did not support this finding.

In reaching its conclusion, the court apparently assumed that, because virtually all of the employees were on "break" during the meeting, they were on "non-duty" time. The defendants persuasively argue that the district court's assumption is incorrect; breaks are in fact "duty" time, both in practice and under the Guard's regulations. The district court took no additional evidence and relied on the administrative record in arriving at its legal conclusion that the plaintiffs were not on duty status during the break. This is a legal question and the scope of our review is plenary.[3]

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3. Plaintiffs contend that we should not review this issue because the defendants raise it for the first time on appeal. The record is not clear in this respect. It seems, however, that the assumption that breaks are duty time formed an essential link in the examiner's chain of logic. Without it, he could not reasonably have reached the issue he dis-

(Continued on following page)

The National Guard Bureau's Technician Personnel Manual, TPM 600/610, at 1-4, provides in pertinent part:

> 1-4. ESTABLISHMENT OF WORK SCHEDULES
>
> d. (ADDED). Rest periods. Short rest periods during the daily tour may be permitted when such periods are beneficial and/or necessary.
>
> . . .
>
> (2) *Rest periods granted in accordance with these provisions are considered duty time and are included in the daily tour of duty.* Rest periods other than those provided herein may not be considered a part of the daily tour of duty; such periods must be charged to the appropriate type of leave. (Emphasis added.)

"Duty" time, under the regulations includes regular break time, unless the breaks are unusual and are charged to leave time. We therefore conclude that the meetings of the technicians to discuss the change in their shift schedule occurred on duty time. The district court erred in concluding otherwise.

Our conclusion that the plaintiffs were on duty time, however, does not end the matter. We must address a critical question that the district court found unnecessary to consider in light of its disposition of the issue of plaintiffs' duty status: were the technicians, including the plaintiffs, conducting internal business of a labor organi-

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(Continued from previous page)

cussed—whether the assembly of the technicians constituted a union meeting and therefore a violation. Thus, it is arguable that the defendants prevailed on this point before the examiner and, without argument, lost it before the district court. We therefore deem it appropriate for review.

zation at their breaktime meetings? As noted above, 5 U.S.C. § 7131(b) prohibits conducting "internal business of a labor organization" on duty time. Although it did not reach the issue of the nature of the business the technicians were conducting on their breaks, the district court does provide some illumination. In its opinion, it tangentially states: "It would be difficult for the court to conclude that plaintiffs conducted internal union business during the August 26 meeting." The court reasoned that the examples of internal business provided in the statute ("the solicitation of membership, elections of labor officials, and collection of dues" 5 U.S.C. § 7131(b)) "do not characterize the substance of the August 26 meeting." If the substance of the meetings did not involve internal union business, there can be no violation regardless of whether the meeting took place on duty time. Because the district court reached its decision on the basis of its review of the administrative record, which we have before us, we are in as good a position to review it and, in the interest of judicial economy, we will do so.

Section 7131(b) provides as examples of internal union business "the solicitation of membership, election of labor organization officials, and collection of dues. . . ." The legislative history is more specific. The Senate Report that accompanied the Civil Service Reform Act of 1978 discussed the distinction between union activities that "relate to the labor management relationship" and those that relate to " 'internal' labor organization business." Examples of the former are "the investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures . . . and dis-

cussing problems in agreement administration with management officials." S. Rep. No. 969, 95th Cong., 2d Sess. 112-113, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2835.

Both the language of the statute and the Senate Report support the conclusion that Congress used the phrase "internal business of a labor organization" in section 7131(b) advisedly. It recognized the distinction between matters that form the ordinary grist for grievances between employees and management — hours, pay, and conditions of employment — and matters that concern the relationship between union members and union organizations. The former could be expected to be the subject of conversation and discussion in the workplace and were not excluded by section 7131(b). Matters, however, involving "internal union business," such as the collection of union dues, the solicitation of union members, and union election campaigning, had no place in the workshop and were barred by section 7131(b).

An examination of the record reveals that at the break meeting the technicians, including plaintiffs, discussed no internal union business. They conducted no internal union business. They merely discussed their concern and objections to the change in the shift schedule without the requisite contractual notice and their potential grievance arising out of the change. In fact, the plaintiffs contended at the hearing that their gathering failed to satisfy the basic criteria for a union meeting because they posted no notice of the meeting and non-union members of the bargaining unit attended.

The examiner found "that the subject matter discussed . . . principally centered around the discontent of several employees with a change in the work week and the night shift arrangement." This was a matter which, under the language of the statute and the lumination of the Senate report, did not constitute *internal* union business. It amounted to nothing more than an ordinary work condition grievance arising out of what the technicians considered to be a management violation of the collective bargaining agreement. The examiner, however, erroneously concluded that these were "matters that are clearly 'Union business.' "[4]

Both the general thrust of the statute and the specific examples of the Senate Report indicate an intent to permit discussions of grievances regarding working conditions. Because such discussions form a substantial segment of a union's activities, it is likely that had Congress intended to preclude such activities, it would have so indicated in the Committee report or in the statute itself. Instead, Congress carefully circumscribed the activities to be forbidden as "internal." Because the discussions of the Union members at the evening meetings fall outside the scope of section 7131(b), we find no merit in the Secretary's contention that the district court erred in reversing the hearing examiner. Accordingly, we hold that a meeting of National Guard technicians for the purpose of discussing a potential working condition grievance does not constitute the

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4. The examiner also concluded that the meeting conducted on August 26 "was, in fact, a Union meeting, called by officials of the Union to conduct Union business." We need not decide whether it was a union meeting in light of the holding we reach.

transaction of "internal union business" within the meaning of section 7131(b).

The hearing examiner also held that plaintiffs violated 5 U.S.C. § 7116[5] by condoning the advocacy of possible job actions designed to disrupt or slow down the activities of the Tactical Wing. The district court disagreed with the examiner, stating that section 7116 applies to unions as entities, not to individual union members. The defendants argue on appeal, as they did in the district court, that the court should review the reasoning of the agency official who made the final decision regarding dismissal, not the reasoning of the examiner. They assert that the Adjutant General may not have relied on this erroneous ground offered by the examiner. Instead, he may have discharged plaintiffs for actually advocating job disruption in violation of 18 U.S.C. § 1918(3)[6] and 5 U.S.C. § 7116(b)(7).

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5. 5 U.S.C. § 7116(b)(7) makes it an unfair labor practice for a labor organization

   (A) to call or participate in, a strike, work stoppage, or slowdown . . . or

   (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity . . . .

6. 18 U.S.C. § 1918(3) (1982) provides in pertinent part that whoever violates 5 U.S.C. § 7311 may not hold a position in the Government of the United States if he

   (3) participates in a strike, or asserts the right to strike, against the Government of the United States . . . .

   5 U.S.C. § 7311 contains essentially the same language as 18 U.S.C. § 1918.

The district court effectively disposed of this argument, an argument that is precluded by the National Guard regulations. The National Guard Bureau Technical Personnel Manual 700 dictates the Adjutant General's scope of review. In cases where a technician has requested a hearing, Regulation 700 5-9(b) provides the Adjutant General with only two options: (1) to consider the examiner's recommendations and render his decision on appeal, Reg. 700 5-9(b)(2), or (2) to take less severe action than recommended, Reg. 700 5-9(b)(3). Regulation 700 5-9(c) further states that if the Adjutant General disagrees with the examiner's findings and recommendations, the Adjutant General must include the basis of that disagreement in his decision. Because Adjutant General Menard accepted the examiner's recommendation and his decision stated no disagreement, this court must agree with the district court that General Menard adopted the reasoning of the examiner. Therefore, we must affirm the district court's disposition under section 7116.

Accordingly, we will affirm the district court in entering summary judgment for the plaintiffs, although we do so for reasons somewhat different than those enunciated by the district court.[7]

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7. An appellate court may affirm a result reached by the district court on reasons that differ so long as the record supports the judgment. *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145 n.1 (3d Cir. 1983); *Behring International, Inc. v. Imperial Iranian Air Force*, 699 F.2d 657, 666 n.7 (3d Cir. 1983).

C.

The district court's grant of summary judgment for plaintiffs under the Administrative Procedure Act vacates their discharge and entitles them to reinstatement, provided they continue to meet all of the requirements for their position as technicians. Plaintiff Sheller, however, has resigned from the National Guard and thus clearly does not meet all of the requirements for reinstatement; he is no longer a military member of a National Guard unit. Plaintiff Johnson has, in the meantime, transferred his military service to the Pennsylvania Air National Guard where he now serves. The district court denied Johnson's motion for reinstatement on the grounds that his membership in the Pennsylvania Guard does not satisfy the requirement of 32 U.S.C. §§ 702(b) and 709(e)(1). Johnson argues on appeal that he does meet this requirement.

The issue arises because the statute that requires a civilian technician also to serve as a military guard member does not specify to which military unit a technician must belong. 32 U.S.C. § 709(b) provides: "Except as prescribed by the Secretary concerned, a technician . . . shall, while so employed, be a member of the National Guard. . . ." Section 709(e)(1) provides that "a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard . . . shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned."

Johnson argues that the statute does not require that the technician perform his military and civilian service in

the same unit. He suggests that the legislative history indicates at most that his military position should be "compatible" with his civilian technician position, "not necessarily in the same unit." The legislative history states:

> The concept of the full-time civilian technician program is that his civilian work will be performed in the same unit in which he holds a mobilization assignment. In other words, the technician would perform his civilian work, his training duty, and be mobilized to active duty in the same unit.
>
> While the foregoing is the general practice the committee did learn in some instances technicians hold military assignments in units different from the units in which they are employed. It is the view of the committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position. The Department of Defense has indicated its formal concurrence with this view.

S. Rep. No. 1446, 90th Cong. 2d Sess. 20 (1968).

Johnson argues that the court should read "compatible" broadly enough to encompass his military service in the Pennsylvania National Guard and civilian employment by the New Jersey Guard. Johnson's interpretation is contrary to the legislative history. 32 U.S.C. § 104(a) indicates that the term "unit," used in the Senate report, refers to lesser divisions of a single state's National Guard. 32 U.S.C. § 104(a) states that "[e]ach State . . . may fix the location of the units . . . of its National Guard."

The Senate report further states:

> The concept of the technician program is that the technicians will serve concurrently in three different ways: (a) Perform full-time civilian work in their units; (b) perform military training and duty in their

> units; and (c) be available to enter active Federal service at any time their units are called.

S. Rep. No. 1446, 90th Cong., 2d Sess. 2 (1968). The district court, however, read the term "unit" in the Senate report as referring to lesser divisions "of a single state's National Guard." It was persuaded that a technician whose military assignment is in one state would not be able to obtain immediate mobilization if his civilian employment status were in another state. Therefore, the court concluded that Johnson's Pennsylvania National Guard service is incompatible with his civilian employment.[8]

The regulatory interpretation of the statute further bolsters the district court's conclusion. Technician Personnel Regulation 302.7-9 states

> A National Guard technician must be assigned to an appropriate military unit . . . *in the State where his technician job is located* (see 32 U.S.C. 709(b)). The concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his technician duties, his military training duties, and be mobilized to active duty in the *same unit.* (Emphasis added.)

Quoted in Martelon v. Temple, 747 F.2d 1348, 1351 (10th Cir. 1984). The court in *Martelon* addressed this issue and concluded that a technician must be a member of a "military unit from which [his] civilian duties can be performed." *Id.* at 1353.

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8. The district court has, however by order dated March 16, 1983, transferred Johnson's claim for back pay to the United States Court of Claims.

The district court's conclusion is consistent with the Technicians Act and its legislative history. We therefore must affirm its denial of Johnson's motion for reinstatement.

IV.

Accordingly, summary judgment for the plaintiffs under the Administrative Procedure Act and the order of the district court denying plaintiffs' motion for reinstatement will be affirmed.

Costs taxed against the Secretary of the Air Force.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 82-2578

ROY JOHNSON and JOHN J. SHELLER,

Plaintiffs

v.

VERNE ORR, etc., et al.,

Defendants

OPINION

THOMPSON, District Judge

Defendants have moved before the court for reconsideration of portions of the court's July 2, 1984 opinion and to certify certain questions to the Third Circuit Court of Appeals.

This case arises out of an incident in which plaintiffs Roy Johnson and John Sheller were dismissed from their positions as civilian technicians of the New Jersey Air National Guard. The firings occurred as the result of a union meeting in which plaintiffs participated. Plaintiffs filed this action against defendants Major General Menard, Colonel Murphy and Brigadier General Young in their individual capacities and against Secretary Orr and Chief of Staff Gerard in their official capacities. Plaintiffs also requested a review of the termination decision pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*

On March 8, 1983, this court held that due to the hybrid state and federal nature of the National Guard, plaintiffs could proceed with an action against defendants in their individual capacities pursuant to 42 U.S.C. § 1983 and directly under the Constitution pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The court also ruled that it had jurisdiction to review the agency's decision under the Administrative Procedures Act. Monetary claims against the federal government were transferred to the Court of Claims, however.

In its opinion of December 21, 1983, the court applied the logic of *Bush v. Lucas,* 51 U.S.L.W. 4752 (1983) and dismissed plaintiffs' *Bivens* claims. The court refused to dismiss plaintiffs' claims under § 1983, however. The court also held that defendant Menard was entitled only to qualified and not judicial immunity.

The court's latest opinion in this matter was delivered on July 2, 1984 upon plaintiffs' motion and defendants' cross-motion for summary judgment on the Administrative Procedures Act claims. The court granted plaintiffs' motion holding that the hearing examiner's finding that the plaintiffs participated in a union meeting during duty time was not supported by substantial evidence, and that the examiner's conclusion that plaintiffs violated 5 U.S.C. § 7116 was contrary to law. The court also found that the examiner's decision to terminate plaintiffs for failing to speak against other employees who had advocated a work stoppage or slow down violated plaintiffs' First Amendment rights and 5 U.S.C. § 1702. The court granted plaintiff Johnson's request for reinstatement as relief.

Defendants also moved for summary judgment on plaintiffs' § 1983 claims. The court reiterated its finding of March 8, 1983 that defendants acted under the color of state law in firing plaintiffs. The court granted defendants' motion for summary judgment on plaintiffs' claim of denial of due process, but denied defendants' motion on plaintiffs' First Amendment claim. The court also denied defendants' motion for summary judgment on their immunity defense.

Defendants now ask the court to reconsider a portion of its most recent ruling. First, defendants request that the court make a formal ruling on their motion to strike supplemental evidence submitted in consideration of the cross-motions for summary judgment on the Administrative Procedures Act claim. That motion is granted. In reviewing the examiner's decision, the court considered as factual evidence only defendants' Exhibit Nos. 5 and 6, the certified record of the transcript of proceedings before Colonel Newman and the certified copies of exhibits presented to Colonel Newman. Affidavits attached to plaintiffs' briefs were not considered for the purpose of the Administrative Procedures Act motion.

Defendants also move for reconsideration of the court's order of reinstatement. Defendants had not briefed the issue in opposition to plaintiffs' motion for reinstatement prior to the court's original ruling. The court hereby grants reargument to consider defendants' arguments.

Plaintiff Roy Johnson is currently a militia member of the Pennsylvania Air National Guard. He requests reinstatement of his civilian employment to the New Jersey

Air National Guard. Defendants argue that a technician must be a member of the National Guard in the State of his or her employment. Plaintiff argues that he need only be a member of the National Guard generally.

32 U.S.C. § 709(b) states, "Except as prescribed by the Secretary concerned, a technician . . . shall . . . be a member of the National Guard . . ." § 709(e) (1) states: "a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned."

For the purposes of the statute, "National Guard" means the Army and the Air National Guard, 32 U.S.C. § 101(3). The Air National Guard means "that part of the organized militia of the several states . . ." which meets certain federally imposed requirements. I also note that 32 U.S.C. § 709(c) states: "The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section." Under § 314(a) there shall be an adjutant general in each State.

Defendants read these sections as requiring that a technician be a member of the Air National Guard of the state in which he is a technician. They urge the court to consider the legislative history of 32 U.S.C. § 709, which states:

> "The concept of the full-time civilian technician program is that his civilian work will be performed in the same unit in which he holds a mobilization assign-

> ment. In other words, the technician would perform his civilian work, his training duty, and be mobilized to active duty in the same unit. While the foregoing is the general practice the committee did learn in some instances technicians hold military assignments in units different from the units in which they are employed. It is the view of the committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position. The Department of Defense has indicated its informal concurrence with this view."

Senate Report, No. 1446, 90th Congress 2nd Session.

Plaintiffs have argued that the legislative history indicates that a technician may be employed within different units and therefore different states. The term "unit," however, refers to lesser divisions of a single state's National Guard. 32 U.S.C. § 104(a) ("Each State . . . may fix the location of the units . . . of its National Guard.") Furthermore, defendants argued persuasively in oral argument that a technician's military assignment in a state different from that of his civilian assignment would be "incompatible." For example, defendants stated that a technician whose military assignment is in one state would not be able to obtain immediate mobilization if needed for that state militia if his civilian employment status was in another state .[1] Plaintiff has failed to show that such a problem could be overcome. The court is persuaded that in light of the legislative history, rein-

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1. According to the legislative history, [t]he concept of the technician program is that the technicians will serve concurrently in three different ways: (a) Perform full-time civilian work in their units; (b) perform military training and duty in their units; and (c) be available to enter active Federal service at any time their units are called.

statement to plaintiff's civilian job in New Jersey would not be an appropriate remedy in this case. Upon reconsideration, plaintiff's motion will therefore be denied.

Defendants have also made a motion for the court to certify a rather lengthy question of law to the Third Circuit. The question essentially asks whether defendants such as these who fire a technician employed under 32 U.S.C. § 709 have acted under the color of state law for the purposes of 42 U.S.C. § 1983. This issue was decided in the affirmative in the court's March 8, 1983 opinion.

An order may be certified to the Third Circuit under 28 U.S.C. § 1292(b) if the district court is of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ."

I certainly agree with defendants that the court's ruling as to the amenability of defendants to suit under § 1983 is a controlling question of law. If erroneous, it would constitute reversible error on final appeal, and it is "serious to the conduct of litigation both practically and legally." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3rd Cir. 1974) *(en banc)*.

Although this court is persuaded as to the soundness of its ruling, I also recognize that the dual federal and state character of the National Guard provides a difficult legal dilemma under § 1983. The complex nature of this question might well give rise to a substantial difference of opinion.

Plaintiffs, however, argue that an interlocutory appeal would not materially advance this litigation. A trial would consist primarily if not exclusively of plaintiffs' First Amendment claims. Defendants' claim that this could be a three week trial involving a number of witnesses, including the presentation of classified military information as to any disruption plaintiffs' actions caused. Plaintiffs argue that the trial will last only a week and would not involve such complex testimony. In either event, the trial would demand counsel's time and expense in preparation. *See Katz, supra,* at 756. (Saving time and expense of litigants is a factor in certifying an interlocutory appeal.) Should this court's ruling as to defendants' status under § 1983 be incorrect, it would all but eliminate the need for a trial. For these reasons, the court will certify a question of law to the Third Circuit.

I request, however, that counsel seek jointly to devise the wording of the submission encompassing the question as to whether defendants' action were under the color of state law. I find plaintiffs' concern as to the wording of the current submission to be meritorious. Counsel should be able to agree upon a submission which would succinctly state the issue.

Defendants also request the entry of a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure on plaintiffs' Administrative Procedures Act claim and the relief of reinstatement. Plaintiffs do not oppose this motion. The court will grant entry of a final order as to these claims, including the denial of plaintiffs' due process claim under the Administrative Procedures Act and § 1983.

As a final note, I draw counsel's attention to the last line on page 9 and the first line on page 10 of this court's July 2 opinion. There is a typographical error in the statute cite which is split between those two pages. In order to avoid confusion as to the court's ruling, I would amend the opinion so that the cite reads "5 U.S.C. § 7116."

I request that in the next five days counsel for defendants prepare a form of order consistent with this opinion which reflect counsel's agreement as to the question certified under 28 U.S.C. § 1292(b) as well as the court's rulings as to reinstatement, the evidence considered under the Administrative Procedures Act, and the entry of a final order.

October 4, 1984.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 82-2578

ROY A. JOHNSON, et al.,
Plaintiffs

v.

VERNE ORR, etc., et al.,
Defendants

OPINION

THOMPSON, District Judge

Appearances:

GAY SNYDER, ESQUIRE
American Federation of
Government Employees
133 Church Street
New Brunswick, N.J. 08901

THOMAS P. FOY, ESQUIRE
Hartman, Schlesinger, Schlosser
and Faxon
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Washington, D.C. 20324

DOROTHY DONNELLY
Deputy Attorney General
Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

(Attorneys for Defendants)

This matter comes before the court on plaintiffs' motion for partial summary judgment against the individual defendants: Major General Wilfred Menard, Colonel John Murphy, Brigadier General Charles Young, and Major Billy McDaniels. Plaintiffs have brough their action under 42 U.S.C. § 1983 for violations of their First and Fourteenth Amendment rights.

The court heard oral argument on this motion on December 3, 1984, and reserved decision at counsel's request pending additional briefing as to defendants' qualified immunity defense. Plaintiffs have also moved for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and the Back Pay Act, 5 U.S.C. § 5596. The court has resolved the attorneys' fees issue without oral argument pursuant to FED. R. CIV. P. 78.

Plaintiffs' complaint stems from their dismissal from employment as civilian technicians of the New Jersey Air National Guard. They allege that they were dismissed in retaliation for the legitimate exercise of their First

Amendment rights. They also allege that they were dismissed in violation of the Civil Service Reform Act.

On July 2, 1984, plaintiffs moved for summary judgment on their claim for review under the Administrative Procedures Act ["APA"]. Defendants made a cross-motion for summary judgment under the APA and 42 U.S.C. § 1983. In ruling on the APA claim, the court reviewed the administrative record produced at a hearing before Examiner Russell Newman. The evidence focused on two meetings held on August 17 and 26, 1981, at which ten to twelve employees met to discuss a change in their work hours. Plaintiffs, who were officials of Local 371 of the National Army and Air Technicians, American Federation of Government Employees, attended both meetings. There was some evidence that a possible strike or job action was discussed. None took place.

After the hearing, Examiner Newman found that plaintiffs had conducted union business on official time in violation of 5 U.S.C. § 7131 of the Civil Service Reform Act. Upon review, the court found that the Examiner's conclusion failed to address the critical factual issue of whether plaintiffs were on duty status. The court also set aside the Examiner's finding that plaintiffs violated 5 U.S.C. § 7116, since § 7116 is addressed to a labor union's practices and not an employee's actions. Finally, the court reversed the Examiner's finding that plaintiffs were at fault because as union officials, they should have attempted to stop other employees from discussing a job action. The court found that the Examiner's ruling on this issue violated plaintiffs' First Amendment rights and violated 5 U.S.C. § 7102 since it put a higher burden on union officials

than union members. Therefore, the court granted plaintiffs' motion for summary judgment under the APA. In an opinion dated October 4, 1984, the court clarified that its ruling on the cross-motions for summary judgment on the APA claims was based solely on the administrative record.

Plaintiffs now move for summary judgment against the individual defendants on their § 1983 claim. They argue that all facts found by the court as a result of the cross-motions under the APA should be taken as conclusive, and that those facts prove that defendants violated plaintiffs' First Amendment rights.

Plaintiffs are correct that the court has found that the Examiner's decision which was adopted ultimately by Major General Menard was inconsistent with the First Amendment. That decision, however, was based solely on the record before Major General Menard. Defendants argue that there are other facts which were not contained in the administrative record which would exonerate defendants as individuals. To put it simply, defendants argue that they should be given an opportunity at trial to establish that their real reasons for firing plaintiffs were not those reasons established in the administrative record, or that the reasons established at the hearing were incomplete. Specifically, defendants propose to introduce confidential information regarding a military mission that plaintiffs threatened to disrupt which would have justified the dismissals.

The facts described by defendants would be material in light of *Pickering v. Board of Education,* 391 U.S. 563 (1968). In *Pickering,* the Supreme Court held that in order to analyze whether a public employee's speech is en-

titled to First Amendment protection, the court must "arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.[1] If, as defendants propose to show, plaintiffs' actions seriously threatened to disrupt an important military mission, it would be relevant to the balancing required by *Pickering*.

The court will allow defendants to present additional evidence at trial to explain why their adoption of the Examiner's decision may have been appropriate despite its facial invalidity. The court's holding of invalidity was based only on the administrative record. Defendants' personal liability was not at issue there, and they may not have presented as full or accurate an explanation of their actions as they intend to present now. This is particularly true for defendants other than Major General Menard. Other defendants appear only to have made recommendations based on partial or incomplete investigations. Menard adopted the Examiner's findings and logic which were found by this court to be invalid.

The court is aware of the Second Circuit's warning in *Beazer v. New York Transit Authority*, 588 F.2d 97, 101 (2d Cir. 1977), *rev'd other grounds* 440 U.S. 568 (1979). There the Second Circuit criticized the Transit Authority

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1. In its July 2, 1984 opinion, the court cited statutory and case law supporting its conclusion that a discussion among public employees of their rights to act in concert is a matter of public concern. Transcript of Opinion, p.13.

for attempting to offer new reasons for a discharge after the discharge was accomplished:

> The [Transit Authority's] argument . . . amounts to an attempt to evade the full force of the district court's holding. The [Transit Authority] first discharged the three employees for one reason and then years later when that reason was held to be illegal, it sought to avoid any remedy for its wrong by asserting other reasons, never before articulated, why the employees could have been discharged at an earlier time. In the case of such illegal discharges, the wrong done by the employer consists not of discharging the employee but of discharging him for an illegal reason. It is irrelevant to the consideration of a remedy for that wrong that the wrong might have been avoided by a discharge for a legal reason.

This court must consider it a question of fact as to whether the reasons now offered by defendants are "post hoc rationalizations" or not. *Id.* Because the question as to individual liability was not so specifically phrased for these defendants during the administrative process, they may not have placed all of their reasons for acting on the record. The court will therefore allow them to develop a full factual record to determine whether each defendant in fact violated plaintiffs' First Amendment rights.[2]

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2. Plaintiffs have argued that in any case, their motion for summary judgment should be granted because they have come forward with evidence—namely the evidence in the administrative record—which shows that they are entitled to judgment as a matter of law. Respondents have alluded to evidence of a secret military mission which they argue would defeat plaintiff's cause of action. They have not, however, supported these assertions with affidavits, depositions or documents.

(Continued on following page)

Plaintiffs had also moved for summary judgment on defendants' defense of qualified immunity. In *Harlow v. Fitzgerald,* 457 U.S. 800, 818, the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See also Wilson v. Schillinger,* 761 F.2d 921, 930 (3d Cir. 1985), and *Deary v. Three Un-named Police Officers,* 746 F.2d 185, 192 (3d Cir. 1984). The parties have argued about whether plaintiffs' constitutional rights were clearly established, and about whether defendants should have known that their conduct would violate these rights. *See, e.g. People of Three Mile Island v. Nuclear Regulatory Commissioners,* 747 F.2d 139 (3d Cir. 1984).

(Continued from previous page)

The Third Circuit has recently stressed a respondent's burden to produce evidence rather than relying on "bare assertions." *Out Front Productions, Inc. v. Magid,* 748 F.2d 166, 172 (3d Cir. 1984). The court will not grant summary judgment at this time on the basis of unopposed facts, however. First, plaintiffs' motion for summary judgment focused on the legal question of whether defendants would be barred from presenting any evidence at trial and not on assessment of the facts. More importantly, however, plaintiffs have not shown how the facts in the record entitle them to judgment against each of the defendants. In other words, although plaintiffs may persuasively argue that General Menard ordered their dismissal for reasons that violated the First Amendment and Civil Services Reform Act, it is not clear that the other defendants based their decisions on these illegal reasons. The court would therefore deny summary judgment at this time notwithstanding defendants' failure to respond as required by FED. R. CIV. P. 56.

Defendants argue that the court cannot rule as to whether they violated clearly established law until all of the facts have been presented. They argue that in light of what defendants knew about the secret military mission, it was reasonable for them to believe that their actions would not violate a clearly established constitutional right. The court would agree that until the record establishes what defendants knew about the military mission, a ruling on their immunity defense is premature.

Plaintiff has also moved for attorneys' fees for the work performed in securing summary judgment under the APA claims. Plaintiff moves under both the Back Pay Act and the Equal Access to Justice Act.

In an opinion dated March 8, 1983, the court transferred plaintiffs' claims under the Back Pay Act to the Court of Claims. The court therefore no longer has jurisdiction to award attorneys' fees under that Act.

This court does, however, have jurisdiction over claims for attorneys' fees under the Equal Access to Justice Act. ["EAJA"]. The EAJA provides that,

> a court shall award a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). The court must first determine whether claimant is a prevailing party. The court must then make findings as to whether the government's position had a reasonable basis in law and fact. *Tressler v. Heckler*, 748 F.2d 146, 149 (3d Cir. 1984) and *Miller v. United States*, 753 F.2d 270, 274 (3d Cir. 1985).

Defendants do not, at least at this time, contest the merits of plaintiffs' petition. Rather, they argue that it is premature. Defendants rely on 28 U.S.C. § 2412(d)(1)(b), which states:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection.

The Third Circuit has recently defined "final judgment" for the first time. *Taylor v. United States*, 749 F.2d 171 (3d Cir. 1985). It held that " 'final judgment' arises and the thirty day cut-off for EAJA petitions begins when the government's right to appeal the order has lapsed . . . or after the termination of the litigation by the court of last resort, or after a losing party asserts that no further appeal will be taken." 749 F.2d at 174. Defendants argue that the court's judgment on the APA claims is not final because they have appealed the court's award of summary judgment.[3] Defendants' view is supported by *Taylor*.

In *Taylor*, the Third Circuit adopted the Seventh Circuit's view that "final judgment" for the purposes of the EAJA refers to the completion of appellate proceedings, and not to the entry of the district court's judgment. *See e.g., McDonald v. Schweiker*, 726 F.2d 311 (7th Cir. 1983). In approving the Seventh Circuit's analysis, the court noted that,

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3. The court entered a final judgment on this issue pursuant to FED. R. CIV. P. 54(b) on October 23, 1984.

> [s]uch an interpretation avoids both unnecessary fragmentation of fee petitions and the waste of juidcial resources that would be caused by filing petitions for fees in cases that are ultimately reversed or remanded. Inasmuch as a plaintiff must be prevailing party before he or she is entitled to EAJA fees, a petition for a fee cannot be resolved until all appeals have run; moreover, EAJA fees are available for appellate as well as trial proceedings. It would seem somewhat anomalous to require an EAJA petition to be filed before the petitioner can know the amount he or she will seek and before the petition may even be addressed.

749 F.2d at 173.

Plaintiffs point, however, to footnote 8 of the *Taylor* opinion, which states: "The EAJA establishes only a deadline after which the EAJA petitions may not be filed: earlier filing is possible. *See McDonald v. Schweiker*, 726 F.2d at 314." On this point, *McDonald* notes that many attorneys apply for fees after the District Court ruling because they are "hungry to see some cash." 726 F.2d at 314. The court stated that the petitioner might have the choice whether to apply for fees after the appeal or after the District Court decision so as to "maximize[] his welfare." *Id.*, at 315.

In this case, the court would find the defendants' view to be more efficient. The court's decision has already been appealed. The Circuit Court's decision is likely to be very helpful in deciding petitioners' fee application. In any event, petitioner will not get paid until after the appeal has been decided. *Id.*, at 314. Therefore, under these circumstances, the court would find that the less fragmented process would be the wiser course. *See Miller v United*

States, supra, at 275 n.3 ("[F]ragmentation of the fee calculation would be unnecessary and inefficient. *Accord, Taylor,* at 174 (interpreting 30 day rule so as to avoid, *inter alia,* fragmentation of fee litigation.)").

Finally, plaintiffs have moved to substitute counsel. Plaintiffs' attorney, Ms. Gay Snyder, is leaving the American Federation of Government Employees' legal staff. Plaintiffs have consented to substitution of Mr. Martin Cohen, another AFGE attorney. There is no opposition to this motion, and it will be granted.

In conclusion, the court will deny plaintiffs' motion for summary judgment without prejudice to their right to reargue the motion when additional facts have been produced. The court will also deny plaintiffs' motion for attorneys' fees without prejudice. Plaintiffs' motion for substitution of counsel is granted.

October 9, 1985.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5859/60

ROY A. JOHNSON and JOHN J. SHELLER,

Appellees

v.

VERNE ORR, Secretary of the Air Force, FRANCIS GERARD, Major General, WILFRED C. MENARD, JR., Major General, COLONEL JOHN MURPHY, BRIGADIER GENERAL CHARLES YOUNG, Air Commander LT. COL. BILLY McDANIEL,

Appellant in No. 84-5859
Appellants in No. 84-5860

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, Circuit Judges, and ROSENN, Senior Circuit Judge*

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Edward Becker
Judge

Dated: March 17, 1986

*As to panel rehearing only.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

February 25, 1986

Nos. 84-5859/60

ROY A. JOHNSON and JOHN J. SHELLER

vs.

VERNE ORR, etc.
Lt. Col. Billy McDaniels, Appellant
in No. 84-5859

Wilfred C. Menard, Jr., etc.,
Appellants in No. 84-5860

Present: SEITZ, BECKER and ROSENN,

Circuit Judges

1. Motion by Appellant, Lt. Col. Billy McDaniels in No. 84-5859, and Appellants, Wilfred C. Menard, Jr., Col. John Murphy and Brigadier General Charles Young in No. 84-5860 for leave to file petition for rehearing out of time.

2. Motion by Appellant in No. 84-5859 for Recall of the Mandate.

3. Motion by Appellants in No. 84-5860 for Recall of the Mandate.

4. Copy of Joint Petition for Rehearing.

5. For your information the opinion was filed and judgment entered on January 13, 1986. This Court's mandate in No. 84-5859 issued on February 4, 1986. This Court's mandate in No. 84-5860 issued on February 19, 1986.

in the above-entitled case. Any Answer which would be due by March 3, 1986 will be forwarded upon receipt of same.

Respectfully,

/s/ Carolyn Hicks
Deputy Clerk
Direct Dial—597-3136

ch
enc.

The foregoing Motions are granted.

By the Court,

/s/ Edward Becker
Circuit Judge

Dated: March 3, 1986

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Honorable Anne E. Thompson

Civil Action No. 82-2578

ROY A. JOHNSON and
JOHN J. SHELLER,

Plaintiffs,

v.

VERNE ORR, et al.,

Defendants.

O R D E R

(Filed October 23, 1984)

This matter having come before the Court on defendants' motion for reargument and certification of portions of the Court's July 2, 1984 Opinion and July 23, 1984 Order, and the Court having considered this motion and opposition and briefs and supporting papers submitted by the parties and the Court having heard oral argument, and for the reasons expressed in the Court's Opinion filed October 9, 1984;

IT IS on this 22nd day of October, 1984,

ORDERED that defendants' motion for reargument on the issue of reinstatement is granted, and on reconsideration, plaintiff's motion for reinstatement will be denied; and it is further

ORDERED that defendants' motion to certify a controlling question of law is granted, and the Court hereby

finds that there is a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation as more fully expressed in this court's opinion filed October 9, 1984, this court certifies the following question of law to the Third Circuit Court of Appeals:

> Whether, under the authority of 32 U.S.C. § 709, the National Guard Technician Act, technician supervisory personnel and the adjutant general of the State of New Jersey act under color of state law for purposes of 42 U.S.C. § 1983 when participating in personnel decisions resulting in the dismissal of two technician employees.

and it is further

ORDERED that defendant Orr's motion for reargument on his prior motion to strike supplemental evidence is granted; and upon reconsideration, supplemental evidence submitted by plaintiffs in support of cross-motions for summary judgment on their claim under the Administrative Procedures Act, is stricken from the record; and it is further

ORDERED that final judgment be entered under Rule 54(b), Federal Rules of Civil Procedure, there being no just reason for delay, as to those portions of this court's order of July 23, 1984, which grant plaintiffs' motion for summary judgment and deny defendants' motion for summary judgment under the Administrative Procedures Act; and grant defendants' motion for summary judgment under 42 U.S.C. § 1983 and the Administrative Procedures Act as to plaintiffs' claim that they were denied due process of law; and as to that portion of this court's order of Oc-

tober 9, 1984 which denies plaintiff's motion for reinstatement under the Administrative Procedures Act; and it is further

ORDERED that the citations at pages 9-10 of the court's July 2, 1984 opinion be amended to read "5 U.S.C. § 7116."

/s/ Anne E. Thompson, U.S.D.J.

APPENDIX H

NEW JERSEY AIR NATIONAL GUARD
Headquarters Air National Guard Base
McGuire Air Force Base, New Jersey 08641

2 September 1981

Reply To
Attn of: 108th MA
Subject: Notice of Proposed Removal

To: TSG John J Sheller
Phoenix Apt. SH #13
Beverly, N J 08010

1. This letter is notice that I propose to remove you from your employment as an Electronic Integrated Systems Mechanic, WG-2650-12, with the New Jersey National Guard to be effective not less than thirty (30) calendar days after receipt of this letter. This proposed removal is based on your conducting an unauthorized meeting of technicians on government time and advocating a slowdown of work and disruption of the 108th TFW Mission. Specifically, the reasons are outlined below:

"On Wednesday evening, 26 August 1981, during the approximate time period 1900-1930 hours, you conducted an unauthorized "on the clock" meeting of certain technicians in Bldg 33-31 and during that meeting you advocated and attempted to persuade technicians present to disrupt the 108 TFW flying activity and associated maintenance functions scheduled for 31 August 1981 by reporting for work at times different than scheduled by their supervisor; by calling in for unscheduled leave and by other means necessary to slowdown the activity of the 108th TFW."

2. You have the right to reply to these charges personally, or in writing, or both personally and in writing, not later than ten (10) calendar days following receipt of this letter. Any reply you make should be addressed to: Brig Gen Charles J Young Jr, Air Commander, 108TFW, McGuire AFB, N J 08641. You may submit any written evidence or affidavits you wish in connection with your reply and set forth any reasons why your removal should not be effected. You will remain in an active technician status during the notice period.

3. Material used to substantiate this proposed removal may be reviewed upon your request between 0730 and 1600 hours daily in the office of Brigadier General Young, Bldg 33-27, McGuire AFB, N J, on any scheduled workday. In addition, you will be authorized official time in the amount not to exceed four (4) hours to prepare and present your reply. You have the right to a representative of your choice in this matter. Your representative, if employed as a NJNG Technician, will be given equal official time in preparing your reply.

4. No decision in this proposed removal has been made and none will be made until after the expiration of time allowed for your reply. Any reply and/or evidence presented will be carefully considered before a decision is made.

5. As soon as possible after your reply is received, or after expiration of the ten (10) calendar days limit, if you do not reply, you will be issued a written decision concerning this proposed removal.

/s/ John B. Murphy, Col., NJANG
Aircraft Maintenance Officer

RECEIPT ACKNOWLEDGED /s/ John J. Sheller
(Signature)

2 Sept 81
(Date)

NEW JERSEY AIR NATIONAL GUARD
HEADQUARTERS AIR NATIONAL GUARD BASE
McGuire Air Force Base, New Jersey 08641

Reply To
Attn of: 108th MA

2 September 1981

Subject: Notice of Proposed Removal

To: TSG Roy Johnson
RFD 1, Box 56A
New Egypt, N J 08533

1. This letter is notice that I propose to remove you from your employment as an Aircraft Ordnance System Mechanic, WG-6652-10, with the New Jersey Air National Guard to be effective not less than thirty (30) calendar days after receipt of this letter. This proposed removal is based upon your (1) conducting an unauthorized meeting of technicians on government time and (2) advocating a slowdown of work and disruption of the 108 TFW Mission. Specifically, the reasons are outlined below:

"On Wednesday evening, 26 August 1981, during the approximate time period 1900-1930 hours, you conducted an unauthorized "on the clock meeting of certain techni-

cians in Bldg 33-31 and during that meeting, you advocated and attempted to persuade technicians present to disrupt the 108TFW flying activity and associated maintenance functions scheduled for 31 August 1981 by reporting for work at times different than scheduled by their supervisor; by calling in for unscheduled leave and by other means necessary to slowdown the activity of the 108th TFW."

2. You have the right to reply to these charges personally, or in writing, or both personally and in writing, not later than ten (10) calendar days following receipt of this letter. Any reply you make should be addressed to: Brig. Gen Charles J Young, Air Commander, 108 TFW, NJANG, McGuire AFB, N J 08641. You may submit any written evidence or affidavits you wish in connection with your reply and set forth any reasons why your removal should not be effected. You will remain in an active technician status during the notice period.

3. Material used to substantiate this proposed removal may be reviewed upon your request between 0730 and 1600 hours daily in the office of Brigadier General Young, Bldg 33-27, McGuire AFB, N J, on any scheduled workday. In addition, you will be authorized official time in an amount not to exceed four (4) hours to prepare and present your reply. You have the right to a representative of your choice in this matter. Your representative, if employed as a NJNG Technician, will be given equal official time in preparing your reply.

4. No decision in this proposed removal has been made and none will be made until after the expiration of time allowed for your reply. Any reply and/or evidence pre-

sented will be carefully considered before a decision is made.

5. As soon as possible after your reply is received, or after expiration of the ten (10) calendar days limit, if you do not reply, you will be issued a written decision concerning this proposed removal.

/s/ John B Murphy, Col, NJANG
Aircraft Maintenance Officer

RECEIPT ACKNOWLEDGED _____
(Signature)

_____
(Date)

Letter was presented to TSG Roy Johnson on 2 Sept 1981, but refused to receipt for it.

/s/ Daniel W. Lingle
For M. D. L.

NEW JERSEY AIR NATIONAL GUARD
Headquarters Air National Guard Base
McGuire Air Force Base, New Jersey 08641

REPLY TO
ATTN OF: ANG/CC 1 October 1981
SUBJECT: Notice of Original Decision to Remove

TO: TSG John J. Sheller

1. The proposed notice of removal, 2 September 1981, informed you of a proposal to remove you from your employment with the New Jersey Air National Guard.

2. I have given full consideration to the information in your written answer of 16 September 1981. I find, however, that the reasons stated in the notice of 2 September 1981, paragraph 1, are sustained. They are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed from your employment effective 6 October 1981.

3. If you consider this action improper, you may appeal this action, in writing, under the National Guard Appeals System, not later than fifteen (15) calendar days after receipt of this letter. The appeal should be addressed to The Chief of Staff, New Jersey Department of Defense, Attn: TPO, Eggert Crossing Road, CN 340, Trenton, New Jersey 08625. You may obtain additional information concerning your appeal rights by contacting Major Billy McDaniel, Technician Personnel Office, NJDOD (609) 984-3625. You have the right to representation in this matter. If you choose to be represented by another employee of the New Jersey National Guard, you and your representative will be allowed a reasonable amount of official time not to exceed four (4) hours in which to prepare the appeal. Such a representative must be designated in writing.

/s/ CHARLES J. YOUNG, JR., Brig. Gen. NJANG

Cy to: Richard Spencer
Henry Szymczak
TPO

I here acknowledge receipt: /s/ John J Sheller
Signature

Date: 6 Oct 81 Time: 1411

NEW JERSEY AIR NATIONAL GUARD
Headquarters Air National Guard Base
McGuire Air Force Base, New Jersey 08641

REPLY TO
ATTN OF: ANG/CC 1 October 1981

SUBJECT: Notice of Original Decision to Remove

TO: TSG Roy A. Johnson

1. The proposed notice of removal, 2 September 1981, informed you of a proposal to remove you from your employment with the New Jersey Air National Guard.

2. I have given full consid ration to the information in your written answer of 14 September 1981. I find, however, that the reasons stated in the notice of 2 September 1981, paragraph 1, are sustained. They are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed from your employment effective 6 October 1981.

3. If you consider this action improper, you may appeal this action, in writing, under the National Guard Appeals System, no later than fifteen (15) calendar days after receipt of this letter. The appeal should be addressed to The Chief of Staff, New Jersey Department of De-

fense, Attn: TPO, Eggert Crossing Road, CN 340, Trenton, New Jersey 08625. You may obtain additional information concerning your appeal rights by contacting Major Billy McDaniel, Technician Personnal Office, NJDOD (609) 984-3625. You have the right to representation in this matter. If you choose to be represented by another employee of the New Jersey National Guard, you and your representative will be allowed a reasonable amount of official time not to exceed four (4) hours in which to prepare the appeal. Such a representative must be designated in writing.

/s/ CHARLES J. YOUNG, JR., Brig Gen, NJANG

Cy to: Richard Spencer
Henry Szymczak
TPO

I hereby acknowledge receipt: /s/ Roy A Johnson
Signature

Date: Oct. 1, 1981 Time: 1500

REPORT OF FINDINGS AND RECOMMENDATION
APPEALS OF ROY A. JOHNSON AND
JOHN J. SHELLER

GENERAL

The case of the appeals of Roy A. Johnson and John J. Sheller was heard jointly upon motion of the appellants. Agency charges against the two were identical and lists of witnesses submitted by appellants and the Agency were identical for each case. Argument for the Agency that the cases should be separated were rejected on the basis of logic and in the interest of preserving the rights of the appellants.

At issue here is not only the resolution of the charges of the Agency that these two men violated two sections of the Civil Service Reform Act, but determination of the extent of duty owed the bargaining unit and the Agency by elected union officials to conduct their duties as officers of the union and representatives of the bargaining unit in good faith.

Specifically, Johnson and Sheller are charged with violation of 5 USC 7131 by conducting Union business while the employees were in a duty status; and, 5 USC 7116 by calling for and condoning a work slowdown and failing to take action to stop such activity.

As in every case of this type, very little black and white exists; the predominate color of testimony is gray and requires much thought and attention to the record to delineate the subtle shades which the Examiner feels form the substance of the truth. Perceptions of what, in fact, constitutes a Union meeting is at issue in the instant case and definition of the fine lines which separate employee rights to assemble, complain, and voice discontent from their duty to follow the tenets of the Union Contract and the Civil Service Reform Act to accrue redress from perceived Agency heavy-handedness. Additionally, the Examiner is faced with the dilemma of deciding if actions of the Appellants are responsible or irresponsible and, if found irresponsible, do they constitute adequate reason for removal.

SPECIFICATION NUMBER	CONTENT
1	Conducting Union Business on Official Time in Violation of the Act.
2	Advocating and Condoning a Work Slow-down and Failure to take Action to Stop such Action in Violation of the Act.

FINDINGS TO SPECIFICATION NUMBER 1.

The Agency contends that the appellants, unhappy with a management decision to change work hours to accommodate a Union request for a long holiday weekend over Labor Day, called a meeting of members of the bargaining unit during work hours and on official time for the purpose of conducting Union business and to decide upon actions to be taken in the face of perceived Agency arbitrariness. The course of testimony leads to the admission of both appellants that a meeting did, in fact, take place during the evening hours of 26 August 1981 (The Record: Monaco, p64, lines 1-14; Donovan, p157, lines 5-24; Johnson, p204, lines 7-24; and Sheller, p308, lines 6-15). Testimony further establishes that both Johnson and Sheller were present at the meeting and that Johnson asked for the meeting and encouraged Sheller to contact as many members as possible. (The Record: Sheller, p306, lines 4-16; Johnson, p204, lines 1-9). Perceptions as to whether the meeting was a Union meeting or a group break vary from witness to witness. Testimony of Mr. Monaco (The Record: p64, lines 1-14) indicates a perception that the meeting was a Union meeting; testimony of Mr. Donovan indicates that he perceives it as a "group break" (The Record: p157, lines 5-24). The appellants take the position that the meeting fails to satisfy certain basic criteria for a Union meeting because there

was no posting of a notice and that non-union members of the bargaining unit were present. (The Record: Johnson, p216, lines 15-22).

Testimony further develops that the subject matter discussed at the meeting was principally centered around the discontent of several employees with a change in the work week and the night shift work arrangement—matters that are clearly "Union business".

The Agency supports its own position on the shift arrangement by bringing testimony that there was a clear mission requirement (The Record: Murphy, p101, lines 4-25 and p102, lines 1-8; Young, p129, lines 2-12). The appellants bring no testimony to refute other than rhetoric.

Counsel for the appellants brings case law to justify conduct of Union business on official time (6 FLRA 32). The point is well taken, however, the instant case is no simple matter of solicitation of union membership done during a break and a connection fails to be made.

In reaching a decision as to whether the Agency should or should not be sustained in this specification, the Examiner must weigh the duty of the Union officials to follow the letter and the spirit of the law and the Union Contract. Officers of the Union have as much duty to be knowledgeable and cognizant of the negotiated agreement and the contract as the Agency. In this case, the Examiner is asked to believe that a fixed definition of a Union Meeting exists and that the instant case fails to satisfy any test for a Union Meeting. The meeting conducted on 26 August 1981 at McGuire Air Base was, in fact, a Union meeting, called by officials of the Union to conduct Union business. For the appellants to claim ignorance of the law or failure to meet

a certain test fails, in my opinion, for lack of simple logic. The Examiner sustains the Agency in Specification Number 1.

FINDINGS TO SPECIFICATION NUMBER 2.

In Specification 2, the Agency contends that the appellants advocated and condoned job actions designed to disrupt or slow down the activities of the 108th Tactical Fighter Group. To prove their contention, the Agency brings witnesses who testify that, at the meeting on 26 August 1981, suggestions were made for night shift Technicians to report at 7:30 AM rather than at the designated time for the night shift to report (The Record: Monaco, p66, lines 14-25; p67, lines 1-2; p72, lines 19-22). Further testimony is brought from Mr. Kohlbenschlag that it was Johnson who advocated coming in at 7:30 AM, take leave, or call in sick (The Record, p357, lines 17-21); and that Sheller, as well, took such a position in discussing proposed job actions (The Record, p363, lines 20-25). Even the appellant's witness, Mr. Donovan, testifies that the meeting was characterized by many men talking about what actions to take (The Record, p177, lines 16-25), though he does not ascribe advocacy of any of the actions to Johnson or Sheller.

The appellants bring testimony denying that they advocated any job actions (The Record: Johnson, p217, lines 4-15; 19-25; p218, lines 1-6). The course of testimony further indicates that Sheller also denies such advocacy. Both appellants, however, agree that there was discussion within the meeting concerning what could be done by employees in the face of management's decision to change working times (The Record: Johnson, p206, lines 7-11; Sheller, p309,

lines 1-8; p331, lines 12-16; p333, lines 15-24; p334, lines 1-16). No where in the testimony does either appellant indicate that they attempted to halt the talk of job action. Therein lies the fault of the appellants. As responsible officials of the Union, they jointly held a duty and responsibility to publicly deny that they condoned any such illegal actions. Their failure to do so taints them with the same brush as if they had advocated the actions.

In the course of the examination, counsel for the appellants attempts to show that due process was denied these men. At no point in the record can I find testimony that the Agency denied them access to the evidence or access to superior officers so that their cases could be aired before a responsible management official who could have stopped the action pressed upon them. I therefore reject counsel's contention that their rights were abrogated.

The Examiner sustains the Agency in Specification Number 2.

RECOMMENDATION

After much and diligent study of the record, the Examiner feels compelled to offer a few words of explanation to the recommendation. It is the Examiner's feeling that, in this case, the appellants failed to take seriously their roles as elected union officials. The testimony of both men leads to the conclusion that they were not only unaware of the tenets of the Union Contract with the New Jersey Department of Defense, they were equally unaware of the provisions of the Civil Service Reform Act as concerns legal activities of the Union. This unfortunate ignorance is, in my humble opinion, what has led to the current sad state

of affairs. It is almost as if these men had been playing at their roles as Union leaders without taking seriously the duty that they have to their constituency and to the Agency.

The Agency, on the other hand, appears to take seriously their role in the National Defense and in preparation for military readiness. The Agency is aware of it's responsibilities and duties to its employees and to higher authority. General Young states that he felt his authority had been impuned by the actions of these appellants; his perception was, I believe, accurate.

The Examiner recommends that the removal of Roy A. Johnson and John J. Sheller be sustained.

/s/ Russell A. Newman
COL, AR, TN ARNG
Appeals Examiner

Incls:
Examiner Exhibits A-D
Agency Exhibits A-E
Appellant Exhibits A-K

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26 January 1982

SUBJECT: Final Decision—Adverse Action Appeal

TSGT John J Sheller
P.O. Box 702
Wrightstown, NJ 08562

1. The purpose of this letter is to inform you that I have received the report of the Hearing Examiner on your adverse action appeal and have reached a final decision.

2. My decision is based upon a comprehensive review and evaluation of the entire matter to include the proposed

removal and related correspondence, the notice of original decision and the report of the Hearing Examiner with recommendations and findings.

3. I have concluded that the charges have been fully supported and it is my final decision to deny your appeal and sustain your removal from employment effective 6 October 1981.

WILFRED C. MENARD, JR.
Major General, NJARNG
The Chief of Staff

CF:
NGB-TNL
COL Newman (Hearing Examiner)
TPO-LR

---

26 January 1982

SUBJECT: Final Decision—Adverse Action Appeal

TSGT Roy A. Johnson
Rt. 1, Box 56A
New Egypt, NJ 08533

1. The purpose of this letter is to inform you that I have received the report of the Hearing Examiner on your adverse action appeal and have reached a final decision.

2. My decision is based upon a comprehensive review and evaluation of the entire matter to include the proposed removal and related correspondence, the notice of original decision and the report of the Hearing Examiner with recommendations and findings.

3. I have concluded that the charges have been fully supported and it is my final decision to deny your appeal and sustain your removal from employment effective 6 October 1981.

WILFRED C. MENARD, JR.
Major General, NJARNG
The Chief of Staff

CF:
NGB-TNL
COL Newman (Hearing Examiner)
TPO-LR

APPENDIX I

§ 709. Caretakers and clerks

(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

(b) Enlisted members of the National Guard and civilians may be employed as caretakers under this section. However, if a unit has more than one caretaker, one of them must be an enlisted member. Compensation under this section is in addition to compensation otherwise provided for a member of the National Guard.

(c) Under regulations to be prescribed by the Secretary concerned, material, armament, and equipment of the Army National Guard or Air National Guard of a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia may be placed in a common pool for care, maintenance, and storage. Not more than 15 caretakers may be employed for each of those pools.

(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National

Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

(e) Funds appropriated by Congress for the National Guard are in addition to funds appropriated by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia for the National Guard, and are available for the hire of caretakers and clerks.

(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them. Aug. 10, 1956, c. 1041, 70A Stat. 614.

(3)

No. 85-2127

Supreme Court, U.S.
FILED
AUG 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LT. COL. BILLY MCDANIEL,
Petitioner,

v.

ROY JOHNSON and JOHN SHELLER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Third Circuit Court of Appeals erred in ruling that Air National Guard technician supervisory personnel and the New Jersey Adjutant General act under color of state law for the purposes of 42 U.S.C. Section 1983 (1982) when participating in personnel decisions resulting in the dismissal of Air National Guard technicians?

2. Whether the Third Circuit Court of Appeals erred in ruling that Congress did not intend to preclude a 42 U.S.C. Section 1983 remedy to an Air National Guard technician terminated pursuant to 32 U.S.C. Section 709(e)?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	9
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Askew v. Bloemaker, 548 F.2d 673 (7th Cir. 1976) .. 10
Bivens v. Six Unknown Agents of the F.B.N., 403 U.S. 388 (1971) 6
Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983) 6, 9, 11, 12
Chappell v. Wallace, 462 U.S. 296 (1983) 7
Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981) 10
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 11
Johnson v. Orr, 776 F.2d 75 (3rd Cir. 1985) 1, 7
Johnson v. Orr, 780 F.2d 386 (3rd Cir. 1986) 1
Lasher v. Shafer, 460 F.2d 343 (3rd Cir. 1972) 11
Lake County Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 8
Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) 8, 11
Middlesex County Sewage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981) 12
Monroe v. Pape, 365 U.S. 167 (1961) 11
NeSmith v. Fulton, 615 F.2d 196 (5th Cir. 1980) 10
New Jersey Air National Guard v. FLRA, 677 F.2d 276 (1981), *cert. denied sub nom. AFGE Local 3486 v. NJANG*, 459 U.S. 988 (1982) 11, 12
Rowe v. State of Tennessee, 609 F.2d 259 (6th Cir. 1979) 10
Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1979) .. 10
Smith v. Robinson, 104 S.Ct. 3457 (1984) 12
United Parcel Service Inc. v. Mitchell, 451 U.S. 56 (1981) 13
United States v. Muniz, 374 U.S. 150 (1963) 13

STATUTES:

Administrative Procedure Act, 5 U.S.C. Section 701 *et seq.* 6, 7
5 U.S.C. Section 5596 6
28 U.S.C. Section 1254(1) 1
28 U.S.C. Section 1292(b) 9, 13

TABLE OF AUTHORITIES—Continued

Page

National Guard Technicians Act of 1968, 32 U.S.C. Section 709 ..... 1, 8, 9, 10
32 U.S.C. Section 709(e) 12
32 U.S.C. Section 709(e)(4) 12
42 U.S.C. Section 1983 ..... 6, 7, 8, 9, 10, 11, 12

RULES AND REGULATIONS:

New Jersey Air National Guard Regulation 40-13 .. 5, 6
Supreme Court Rule 17.1(a) 10
Technician Personnel Manual Chapter 700 5

LEGISLATIVE MATERIALS:

H.R. Rep. No. 1823, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 3318, 3319 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2127

LT. COL. BILLY MCDANIEL,
Petitioner,

v.

ROY JOHNSON and JOHN SHELLER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 780 F.2d 360 (3rd Cir. 1986), *reh'g denied* (March 17, 1986) (Pet. App. 85a). A second decision detailing other aspects of the case is reported at 776 F.2d 75 (3rd Cir. 1985) (Pet. App. 45a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-44a) was entered on January 13, 1986. A timely petition for rehearing was denied on March 17, 1986 (Pet. App. 85a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Respondents, Roy Johnson and John Sheller, are two New Jersey Air National Guard civilian technicians, who were removed from employment on October 6, 1981. Until their firings they each had over 12 years of unblemished, excellent service. As technicans, respondents worked for the New Jersey Department of Defense pursuant to 32 U.S.C. Section 709, the National Guard Technicians Act of 1968 (hereinafter "Technicians Act of 1968"). While they were civilian federal employees pursuant to section 709, their employment and that of petitioner [1] required membership in the National Guard and the maintenance of an appropriate rank. Respondents worked at the 108th Tactical Fighter Wing at McGuire Air Force Base in New Jersey as aircraft mechanics. They were also active in National Army and Air Technicans, American Federation of Government Employees, AFL-CIO, Local 371 (hereinafter "Local 371"), the union which represents technicians. Respondent Johnson served as chief steward, and respondent Sheller was a steward. As stewards, it was their duty to advise technicians who worked at the 108th Tactical Fighter Wing about matters affecting working conditions. Local 371 and the New Jersey Department of Defense were parties to collective bargaining agreements, which are contained in the administrative record.

During the afternoon of August 26, 1981, Mr. Johnson was approached by other technicians, who had heard that their work hours for August 31, 1981, would be altered by the agency on very short notice. Their normal Monday hours were during the day shift. However, on August 31, 1981, they were scheduled to work the evening shift. Johnson suggested to the other technicians that he would

---

[1] Petitioner, Lt. Col. Billy McDaniel, is one of several similarly situated supervisors who were sued and who received an unfavorable ruling from the court of appeals on a certified controlling question of law. He alone filed the instant petition.

speak to them during their break time, assuming they had time for a break, after he contacted an agency representative. The night shift technicans had for years been entitled to a break when the work permitted. They had never been required to first seek approval from a supervisor. Rather, since the employees were responsible for maintenance and repair of airplanes, a lull in work occurred while the planes were being flown. During this period, technicians usually would take a break. Mr. Johnson, therefore, decided it would be best to get together that evening after the planes were in the air, if the employees' work schedules permitted.

That evening, after the planes were launched, several technicians, including respondents, informally gathered to discuss the shift change. At no time did respondents suggest that the employees take leave, appear at other than their normal starting time of 7:30 a.m., or follow technical orders for the express purpose of slowing down the agency. Nor did respondents at any time advocate a strike, slow down, or job action. Respondent Sheller hardly spoke at all. Respondents were not sure how to advise their co-workers and said so. Mr. Johnson later contacted another union official for advice.

On August 27, 1981, during a break, respondents advised their co-workers that they must arrive at the new hours and that the union would file a grievance or unfair labor practice charge. All technicians who were scheduled to work on August 31, 1981, arrived at the new hours.

On or about September 2, 1981, respondents each received a letter from Colonel Murphy proposing that they be fired. The letter, which was written on New Jersey Department of Defense letterhead, stated in pertinent part:

> 1. This letter is notice that I propose to remove you from your employment . . . . This proposed re-

moval is based upon your conducting an unauthorized meeting of technicians on government time and advocating a slowdown of work and disruption of the 108 TFW Mission. Specifically, the reasons are outlined below:

> "On Wednesday evening, 26 August 1981, during the approximate time period 1900-1930 hours, you conducted an unauthorized "on the clock" meeting of certain technicians in Bldg. 33-31 and during that meeting you advocated an [sic] attempted to persuade technicians present to disrupt the 108 TFW flying activity and associated maintenance functions scheduled for 31 August 1981 by reporting to work at times different than scheduled by their supervisor; by calling in for unscheduled leave and by other means necessary to slowdown the activity of the 108th TFW."

Pet. App. 92a. As the afore-quoted letter indicates, respondents were at all times acted against as either civilian employees or union representatives.

On or about October 1, 1981, Brigadier General Charles Young, the second level supervisor, issued decision letters to each respondent on New Jersey Department of Defense letterhead. The letter stated, as herein relevant:

> 1. The proposed notice of removal, 2 September 1981, informed you of a proposal to remove you from your employment with the New Jersey Air National Guard.
>
> 2. I have given full consideration to the information in your written answer . . . . I find, however, that the reasons stated in the notice of 2 September 1981, paragraph 1, are sustained. They are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed from your employment effective 6 October 1981. . . .

Pet. App. 96a-97a. Again, the above-quoted decision letter shows respondents were removed from civilian employ-

ment. At all times relevant Brigadier General Young and Colonel Murphy were advised by petitioner, Lt. Col. Billy McDaniel, who was the agency's labor relations expert. Petitioner McDaniel's position description indicates that his responsibility is to advise "the state."

In December, 1981, respondents had a two-day hearing before Mr. Russell Newman, National Guard Appeals Examiner, pursuant to federal regulations, Technician Personnel Manual Chapter 700, and state regulations, New Jersey Air National Guard Regulation 40-13 (hereinafter "NJANGR 40-13"). Petitioner McDaniel assisted the agency representative. Mr. Newman ruled that, while the evidence was inconclusive, respondents had advocated illegal activity as charged:

> Both respondents . . . agree that there was discussion within the meeting concerning what could be done by employees in the face of management's decision to change working times . . . . Nowhere in the testimony does either appellant indicate that they attempted to halt the talk of the job action. *Therein lies the fault of the appellants. As responsible officials of the Union, they jointly held a duty and responsibility to publicly deny that they condoned any such illegal actions. Their failure to do so taints them with the same brush as if they had advocated the actions.*

Pet. App. 103a-104a [emphasis supplied]. In January, 1982, Wilfred C. Menard, Jr., as Adjutant General (Chief of Staff) and head of the N.J. Department of Defense, issued a letter, adopting Mr. Newman's findings (Pet. App. 105a-107a). Several months later respondents left the New Jersey Air National Guard, one by retirement and the other by transfer.

Deposition testimony and other evidence make clear that during the above proceeding Mr. Murphy and Mr. Young consulted with petitioner McDaniel, the agency's labor relations expert, regarding what action to take.

Both Young and Murphy acknowledged that they specifically talked with him about the appropriate administrative regulations, NJANGR 40-13, among other items. Petitioner McDaniel sent Mr. Johnson a portion of that regulation in October, 1981, following Mr. Johnson's request for information regarding his appeal rights. At no time were respondents disciplined pursuant to any military procedure.

On August 6, 1982, the respondents filed a verified complaint against the federal government and against three individuals: Adjutant General Wilfred C. Menard, Jr.; John Murphy; and Charles Young. The individual defendants are the three supervisory technicians responsible for wrongfully firing appellants from their jobs as New Jersey Air National Guard technicians.

The complaint alleged that respondents' discharges were arbitrary, capricious, not in accordance with law, and in violation of the First and Fifth Amendments of the United States Constitution. Specifically, respondents sought compensatory and punitive damages and equitable relief pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), 5 U.S.C. Section 5596, 42 U.S.C. Section 1983, and the Administrative Procedure Act, 5 U.S.C. Section 701 *et seq.* (hereinafter "A.P.A.").

In December, 1982, the government filed a motion to dismiss, arguing *inter alia* that *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983), and related cases prohibited a *Bivens* action by federal employees against their supervisor and that the individuals were clothed by official immunity.

The district court, in an opinion filed on March 8, 1983, denied the government's motion in most respects. In its opinion the court noted that the National Guard is both a state and federal entity and that the Third Circuit has permitted suits by technicians, pursuant to 42 U.S.C. Section 1983, against their supervisors.

In October, 1983, the government filed a second motion to dismiss, arguing *inter alia* that *Bush v. Lucas*, *supra*, and *Chappell v. Wallace*, 462 U.S. 296 (1983), mandated dismissal of this action against the individual supervisors. Pursuant to *Bush*, the district court dismissed respondents' claims against their federal supervisors, which had been brought directly under the Constitution, but retained jurisdiction of all remaining claims. The court rejected the government's arguments that *Chappell* gave them military immunity. Respondents subsequently filed an amended complaint, adding Lt. Col. Billy McDaniel as an individual defendant for his role in advising the other defendants to fire them.

On May 25, 1984, respondents filed a Motion for Partial Summary Judgment under the A.P.A. The government similarly filed a Motion for Summary Judgment under the A.P.A. and 42 U.S.C. Section 1983, arguing *inter alia* that the state action needed under section 1983 was lacking herein. Defendants also argued that the employees' constitutional rights were not transgressed. The court granted Mr. Johnson's and Mr. Sheller's Motion for Summary Judgment under the A.P.A., finding that the hearing examiner's factual findings were unsupported by the record and his conclusions were contrary to law, including the First Amendment.

The government then sought certification of a controlling question of law. By an opinion dated October 22, 1984, the district court entered final judgment as to the following parts of its July 24, 1984 order: 1) the grant of summary judgment for Mr. Johnson and Mr. Sheller under the A.P.A. (This judgment was affirmed by the court of appeals, and that decision is now final. See *Johnson v. Orr*, 776 F.2d 75 (3rd Cir. 1985).); 2) the grant of summary judgment for petitioner as to respondents' due process claims under the A.P.A. and section 1983; and 3) the denial of Mr. Johnson's request for reinstatement (Pet. App. 89a-91a).

The district court also certified the following controlling question:

> Whether, under the authority of 32 U.S.C. Section 709, the National Guard Technicians Act, technician supervisory personnel and the adjutant general of the state of New Jersey act under color of state law for purposes of 42 U.S.C. Section 1983 when participating in personnel decisions resulting in the dismissal of two technician employees?

Pet. App. 90a.

A panel of the United States Court of Appeals for the Third Circuit, one member dissenting, answered the certified question in the affirmative. It is that decision which is the subject of the present petition (Pet. App. A). In reaching its conclusion the court of appeals carefully examined the mixed federal-state nature of the New Jersey Air National Guard in order to determine if the supervisory employees in this matter, including the petitioner, acted under color of state law when they participated in the termination of the civilian employment of Mr. Johnson and Mr. Sheller. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *Lake County Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). The court of appeals described the legislative history of the Technicians Act of 1968, as follows:

> A more express statement of congressional objectives could not be asked for, and none of these objectives suggests that Congress intended to reduce the state involvement in the Guard . . . . In explaining the provisions about adjutant generals, for example, the House Report said:
>
> > This requirement is intended to achieve two purposes:
> >
> > a) recognize the State character of the Guard and b) meet the requirement of giving the adjutant generals (who are State offi-

> cers) the statutory function of employing Federal employees.

Pet. App. 13a-14a, citing H.R. Rep. No 1823, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 3318, 3319.

In light of the above-described legislative history and the statutory language itself, the court held that the Technicians Act of 1968 did not reflect a congressional intent to so delimit the state characteristics of the National Guard as to preclude a finding of adequate action under "color of state law" to support a section 1983 cause of action by a discharged technician. The court of appeals, furthermore, found that while said Act did set forth in brief fashion an internal administrative remedial scheme for discharged technicians, it did not establish a comprehensive external remedial scheme similar to the one found by this Court in *Bush v. Lucas, supra*, to there manifest a congressional intent to preclude a section 1983 type cause of action (Pet. App. 17a-22a). On both of the foregoing legal conclusions the dissenting member of the panel of the court of appeals found to the contrary (Pet. App. 23a-44a).

REASONS FOR DENYING THE PETITION

1. There is no conflict of law among the circuit courts on the certified question of law ruled upon by the Third Circuit Court of Appeals. The court of appeals' decision herein was in response to an interlocutory appeal from a ruling of the U.S. District Court for the District of New Jersey. That appeal presented a specific controlling question of law pursuant to 28 U.S.C. Section 1292(b). The question was:

> Whether, under authority of 32 U.S.C. Section 709, technician supervisory personnel and the Adjutant General of the State of New Jersey, act under color of state law for purposes of 42 U.S.C. Section 1983 when participating in personnel decisions resulting in the dismissal of two technician employees?

The holding of the circuit court of appeals herein was that said individuals *do act under color of state law for purposes of 42 U.S.C. Section 1983.* Pet. App. 14a-17a. This decision is in conformity with rulings on the same question of law by two other circuit courts of appeals: *Rowe v. State of Tennessee*, 609 F.2d 259 (6th Cir. 1979); *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1979). *See also Schultz v. Wellman*, 717 F.2d 301 (6th Cir. 1983) (following *Rowe*). No federal court of appeals has reached a contrary result.

Although petitioner claims that the reasoning in both *Rowe* and *NeSmith* was flawed (Pet. 10), such an assertion does not overcome the fact that the three circuit courts of appeals that now have ruled on the legal issue here under consideration have all reached the same conclusion. In such a situation it would be inappropriate for this Court to grant the petition for a writ of certiorari. See Rule 17.1(a) of the Rules of the Supreme Court.

2. The petitioner alleges that the instant decision conflicts with decisions from other circuits. Specifically, petitioner argues that the court of appeals herein has found action under color of state law for purposes of 42 U.S.C. Section 1983 in conflict with decisions in two other circuits. The petitioner cites *Askew v. Bloemaker*, 548 F.2d 673 (7th Cir. 1976) and *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981).[2] Those two cases, however, did not involve employees or agents of the National Guard or the provision of the Technicians Act of 1968. While it is true that these cases involved mixed federal-state activities, the mere existence of such a mixture, which is a common phenomenon, does not make the decisions relevant to the

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[2] *Askew* involved a federally conceived, staffed, and directed narcotics raid that utilized, in a limited manner, three St. Louis Missouri police officers. *Ellis* concerned certain federal Social Security Administration final decisions which followed provisional decisions made earlier by a New York state employee.

organizational peculiarities of the National Guard. The National Guard is known to be a very unusual, permanent federal-state entity of considerable complexity. See *e.g., Lasher v. Shafer*, 460 F.2d 343 (3rd Cir. 1973) and *New Jersey Air National Guard v. Fed. Labor Rel. Auth.*, 677 F.2d 276 (3rd Cir. 1982).

In the instant case New Jersey officials, including petitioner, acting at the state level without any involvement from a national headquarters, proposed and decided to terminate the respondents. The adjutant general, who effected the terminations, was at all times a state official, even though he was expected to act pursuant to federal regulations (Pet. App. 15a-16a). The Third Circuit's detailed evaluation of the administrative organization and operational activities of the New Jersey Air National Guard in this case is completely consistant with the process utilized by this Court in evaluating mixed federal-state organizations and activities for possible action "under color of state law." In addition, its conclusion in finding action "under color of state law" for purposes of section 1983 is in conformity with the decisions of this Court. *Lugar v. Edmondson Oil Co. Inc., supra*; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Monroe v. Pape*, 365 U.S. 167 (1961).

3. The court of appeals' decision properly concluded that the Technicians Act of 1968 neither created a comprehensive remedial scheme for disciplined technicians, such as the respondents herein, nor precluded the availability of an already existing statutory remedy, such as a 42 U.S.C. Section 1983 cause of action. Hence, this Court's ruling in *Bush v. Lucas, supra*, was found not to be controlling. As stated by the majority opinion in the court of appeals:

> The context in which the 1968 Act was passed suggests that the provisions establishing a "remedial scheme" were designed merely to clarify the internal procedures and authority of the Guard in the wake

> of the technicians' new status as federal employees. There is no evidence in the legislative history that Congress was crafting a comprehensive remedial scheme intended to preclude other remedies available to technicians. Indeed congressional discussion of the statute is almost entirely bereft of reference to either Section 709 (e) specifically or the statute's role in creating a remedial scheme generally.

Pet. App. 22a, n.17. The "remedial" scheme of the Technicians Act of 1968 is clearly much more limited than those discussed in the cases inappropriately relied upon by the petitioner, *i.e.*, *Middlesex City Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981) (Federal Water Pollution Control Act intended as exclusive remedy) and *Smith v. Robinson*, 104 S. Ct. 3457 (1984) (Education of the Handicapped Act intended as exclusive remedy).

Furthermore, in *Bush* the remedial administrative scheme involved the right to appeal a termination to a neutral quasi-judicial agency, *i.e.*, the Merit Systems Protection Board, while pursuant to section 709(e)(5) of the Technicians Act of 1968 discharged technicians, such as the respondents, are only provided the right to appeal internally to the same adjutant general who took the action against them. 32 U.S.C. Section 709(e)(4) (Pet. 2-3).

Finally, it should be noted that the prefatory language found in 32 U.S.C. Section 709(e) does not prohibit additional judicial remedies, such as a section 1983 cause of action, which might be available to discharged technicians like the respondents, but prohibits only additional administrative remedies that might conflict with those found in the Act. *New Jersey Air National Guard v. Federal Labor Relations Authority, supra* (Pet. App. 17a-22a).

4. The court of appeals issued its decision herein concerning an interlocutory appeal on a specific certified

question of law which did not in any way include the issue of whether military discipline or national security would be impaired if a section 1983 suit were allowed. Since no evidence on this issue was entered at the district court level, and since this issue was not certified to, or ruled upon, by the court of appeals, this issue is not ripe for consideration by this Court. There is clearly no evidence of record supporting petitioner's assertion that the ruling of the court of appeals endangers national security. In fact, the U.S. District Court judge who permitted, pursuant to 28 U.S.C. Section 1292(b), the interlocutory appeal ruled upon by the court of appeals, remains prepared to hear evidence on this issue (Pet. App. 77a-80a). It should also be noted that each of the cases cited by the petitioner with regard to its "endangering of national security" argument arose in a wholly military context and did not, as in the instant situation, involve dual status civilian employees of a National Guard unit. See *e.g.*, *United States v. Muniz*, 374 U.S. 150 (1963), which is cited by petitioner (Pet. 16).

The arguments of the *amicus curiae*, the Adjutants General Association of the United States, are likewise based on the assumption, not supported by any evidence in the record, that the civilian job activities of the respondents herein were totally military in nature. Based on this unsupported assumption, the *amicus* brief proceeds to argue that to permit section 1983 actions by guard technicians against their supervisors will create a threat to national security (Brief of Amicus Curiae at 4-11). This potentially important argument, however, is clearly not now ripe for review by this Court. In addition, said matter was not raised by the petitioner in his brief and, hence, should not be considered. *United Parcel Service Inc. v. Mitchell*, 451 U.S. 56 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1985

LIEUTENANT COLONEL BILLY McDANIEL,
Support Personnel Management Officer,
New Jersey Air National Guard,

Petitioner,

vs.

ROY JOHNSON and JOHN J. SHELLER,

Respondents.

BRIEF OF AMICUS CURIAE ADJUTANTS GENERAL ASSOCIATION OF THE UNITED STATES

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TABLE OF CONTENTS

Page

TABLE OF CASES AND OTHER AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT—

POINT ONE

ALLOWING A SUIT FOR DAMAGES BY MILITARY PERSONNEL AGAINST A SUPERIOR OFFICER UNDER 42 *U.S.C.* § 1983 WOULD DAMAGE THE NECESSARY UNIQUE RELATIONSHIP BETWEEN MILITARY PERSONNEL AND THEIR OFFICERS AND SO SUCH CLAIMS MUST BE BARRED ... 4

POINT TWO

THE STATUTE PROVIDING AUTHORITY FOR THE ACTION TAKEN DOES SO AS A MATTER OF FEDERAL LAW SO THAT THE ADJUTANT GENERAL DID NOT ACT UNDER COLOR OF STATE LAW, AND IN ANY EVENT THE STATUTE PREEMPTS THIS CAUSE OF ACTION 18

CONCLUSION 19

TABLE OF APPENDIX

DECISION OF THE HONORABLE ANNE E. THOMPSON FILED DECEMBER 22, 1983 ..... App. 1

TABLE OF CASES AND OTHER AUTHORITIES

Page(s)

CASES

Alvarez v. Wilson, 600 *F. Supp.* 706 (N.D. Ill. 1985) 10

American Federation of Government Employees v. Federal Labor Relations Authority, 730 *F.*2d 1534 (D.C. Cir. 1984) 12, 13

Askew v. Bloemker, 548 *F.*2d 673 (7th Cir. 1976) 18

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 *U.S.* 388, 91 *S. Ct.* 99, 29 *L.Ed.*2d 619 (1971) 4, 5, 7, 9, 19

Brown v. United States, 739 *F.*2d 362 (8th Cir. 1984), cert. den. — *U.S.* —, 105 *S.Ct.* 3524 (1985) 8, 9, 16

Bush v. Lucas, 461 *U.S.* 367, 103 *S.Ct.* 2404, 76 *L.Ed.*2d 648 (1983) 19

California National Guard v. Federal Labor Relations Authority, 697 *F.*2d 874 (9th Cir. 1983) 13

Carlson v. Greene, 446 *U.S.* 14, 100 *S.Ct.* 1468, 64 *L.Ed.*2d 15 (1980) 2

Chappell v. Wallace, 462 *U.S.* 296, 103 *S.Ct.* 2362, 76 *L.Ed.*2d 586 (1983) 3, 4, 5, 7, 8, 9, 10, 16, 17

Ellis v. Blum, 643 *F.*2d 68 (2d Cir. 1981) 18

Feres v. United States, 340 *U.S.* 135, 71 *S.Ct.* 153, 95 *L.Ed.*2d 152 (1950) 3, 5, 9, 10, 15, 16, 17

Gaspard v. United States, 713 *F.*2d 1097 (5th Cir. 1983), cert. den. — *U.S.* —, 104 *S.Ct.* 2354, 80 *L.Ed.*2d 826 (1984) 10

TABLE OF CASES
AND OTHER AUTHORITIES—Continued

Page(s)

Gilligan v. Morgan, 413 *U.S.* 1, 93 *S.Ct.* 2440, 37 *L.Ed.*2d 407 (1973) 6, 7

Jaffee v. United States, 663 *F.*2d 1226 (3d Cir. 1981) (en banc), cert. den. 456 *U.S.* 972, 102 *S.Ct.* 2234, 72 *L.Ed.*2d 845 (1982) 10

Johnson v. Orr, 780 *F.*2d 386, 389, n.6 (3d Cir. 1986) 2

Johnson v. Orr, 776 *F.*2d 75 (3d Cir. 1985) 16

Martelon v. Temple, 747 *F.*2d 1348 (10th Cir. 1984) cert. den. — *U.S.* —, 105 *S.Ct.* 2675 (1985) 7

Miller v. United States, 643 *F.*2d 481 (8th Cir. 1981) 15, 16

Mindes v. Seaman, 453 *F.*2d 197 (5th Cir. 1971) 14, 15

Mollnow v. Carlton, 716 *F.*2d 627 (9th Cir. 1983), cert. den. 466 *U.S.* 956, 104 *S.Ct.* 2162 9

Montana Air National Guard v. Federal Labor Relations Authority, 730 *F.*2d 577 (9th Cir. 1984) 12

NeSmith v. Fulton, 615 *F.*2d 196 (5th Cir. 1980) 14

New Jersey Air National Guard v. Federal Labor Relations Authority, 677 *F.*2d 276, 286 (3d Cir. 1982), cert. den. 459 *U.S.* 988, 103 *S.Ct.* 343, 74 *L.Ed.*2d at 384 ..... 12, 14

United Parcel Service Inc. v. Mitchell, 451 *U.S.* 56, 60 n.2, 101 *S.Ct.* 1559, 67 *L.Ed.*2d 732 (1981) 2

United States v. Brown, 348 *U.S.* 110, 112, 75 *S.Ct.* 141, 143, 99 *L.Ed.*2d 139 (1954) 5

United States v. Muniz, 374 *U.S.* 150, 162, 83 *S.Ct.* 1850, 1858, 10 *L.Ed.*2d 805 (1963) 5

TABLE OF CASES AND OTHER AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

32 *U.S.C.* § 102 11

32 *U.S.C.* § 709 ..... 4, 11, 18

32 *U.S.C.* § 709(b) 11

32 *U.S.C.* § 709(e) 12, 14

32 *U.S.C.* § 709(e)(4) 13

32 *U.S.C.* § 709(g)(1) 16

42 *U.S.C.* § 1983 ..... 1, 3, 4, 7, 8, 18, 19

42 *U.S.C.* § 1985 ..... 4, 7, 9, 10

42 *U.S.C.* § 1986 9

INTEREST OF THE AMICUS CURIAE

This case presents an issue of general importance for the National Guard throughout the United States, and in particular for the Adjutants General of the National Guard in the various states as the commanding officers. The amicus curiae, the Adjutants General Association of the United States (hereafter AGAUS) is the organization made up of all of the various state Adjutants General, each and every one of whom will be vitally affected by the outcome of this case. What has been advanced is a cause of action for damages against the Adjutant General of New Jersey along with other ranking officers of the New Jersey Air National Guard, relating to the termination of employment of two federal National Guard Technicians. As a separate part of this case, in a ruling by the Third Circuit which is not at issue before this Court on the petition for certiorari, the propriety of that dismissal was adjudicated. This portion of the litigation now presented to the Supreme Court deals only with the additional remedy of damages for alleged violation of federally protected rights pursuant to 42 *U.S.C.* § 1983. It is the right of National Guard Technicians, who by law are all part of National Guard military units, to sue their superior officers for money damages that is of grave concern to all Adjutants General in the performance of their military duties.

Aside from the clearly legitimate interest in the outcome of this matter, the overriding reason why leave should be granted for the AGAUS to appear as amicus curiae is that the prime policy argument against allowing this cause of action, while raised at the District Court level,[1] was not

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[1]See the decision of District Judge Anne Thompson filed on December 22, 1983, and appended to this brief.

part of the interlocutory question certified to the Third Circuit which court, accordingly, did not reach it. Yet it is this issue, whether the military nature of an Adjutant General's decision to terminate National Guard Technician employment should bar a civil rights action for damages, that would certainly be dispositve of this case and ought to be considered by this Court now. As the petition for certiorari has not included this as a question presented, although addressing it in Point II, this Court is respectfully urged to allow the AGAUS to appear as amicus in order to advance the argument, a substantial one which has met favor in various circuit courts of appeal as will be cited *infra* in the argument portion of this submission.

The AGAUS recognizes that this Court has at times in the past expressed that it will not consider arguments raised only by an amicus and not by the petitioner. *United Parcel Service Inc. v. Mitchell,* 451 *U.S.* 56, 60 n.2, 101 *S. Ct.* 1559, 67 *L.Ed.*2d 732 (1981). However, the Court has also stated that it is not barred from considering issues which are not part of the petition for certiorari. *Carlson v. Greene,* 446 *U.S.* 14, 100 *S. Ct.* 1468, 64 *L.Ed.*2d 15 (1980). Here, the argument advanced by AGAUS was made to the District Judge. For reasons not known to AGAUS, that issue was not certified to the Third Circuit although raised by AGAUS as amicus there. The Third Circuit declined to address it as noted in its opinion. *Johnson v. Orr,* 780 *F.*2d 386, 389, n.6 (3d Cir. 1986). Because this is an issue involving the United States military and the ability of key officers, the Adjutants General of the National Guard throughout the country, to perform their duties, this is certainly a case in which the Court ought to exercise its ability to consider an issue going beyond the petition for certiorari.

The AGAUS fully supports the arguments put forth in the petition for certiorari and certainly should be considered to join in those arguments. Because the points raised by petitioner have been more than adequately addressed, AGAUS will not seek to present any substantial further discussion. Those arguments are completely meritorious as recognized by Judge Rosenn in his dissent in the Third Circuit.

Both counsel for the petitioner and for respondents have consented to AGAUS filing an amicus brief, and written consent is submitted herewith.

———o———

SUMMARY OF ARGUMENT

This Court in decisions beginning with *Feres v. United States,* 340 *U.S.* 135, 71 *S. Ct.* 153, 95 *L.Ed.* 152 (1950) and running through *Chappell v. Wallace,* 462 *U.S.* 296, 103 *S. Ct.* 2362, 76 *L.Ed.*2d 586 (1983), has, as a matter of policy, barred actions for damages by military personnel against their superior officers. The cause of action asserted here for damages under 42 *U.S.C.* § 1983 against the Adjutant General of New Jersey and other ranking officers by National Guard Technicians, who by law are also required to be active members of military units, runs afoul of the *Feres* doctrine as applied in *Chappell* and so must be prohibited.

For the reasons expressed by Judge Rosenn in his Third Circuit dissent in this case, appearing at 780 *F.*2d 395, et seq., the action of the Adjutant General in dismissing the two plaintiffs from their technician employment was not done "under color of state law" as required by Section

1983, and the National Guard Technician Act of 1968, 32 *U.S.C.* § 709, provides a complete statutory remedy which was intended to be exclusive and preempts the right to bring an action under Section 1983.

———o———

ARGUMENT

POINT ONE

ALLOWING A SUIT FOR DAMAGES BY MILITARY PERSONNEL AGAINST A SUPERIOR OFFICER UNDER 42 U.S.C. § 1983 WOULD DAMAGE THE NECESSARY UNIQUE RELATIONSHIP BETWEEN MILITARY PERSONNEL AND THEIR OFFICERS AND SO SUCH CLAIMS MUST BE BARRED.

This Court has long recognized that there are special relationships between military personnel and their superior officers that should not be tested in the courts. To be consistent with past opinions upholding that rationale, the cause of action asserted here for damages under 42 *U.S.C.* § 1983 must, as a matter of public policy, be prohibited.

The case whose extension to the facts here must govern is *Chappell v. Wallace, supra.* In that case enlisted men aboard a Navy vessel brought an action seeking damages against their commanding officer, four lieutenants and some noncommissioned officers. The claim raised was that these enlisted men received unequal treatment on account of their race. Causes of action were asserted under 42 *U.S.C.* § 1985, and also under the precedent of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 *U.S.* 388, 91 *S. Ct.* 99, 29 *L.Ed.*2d 619 (1971).

This Court referred to the fact that in the *Bivens* decision, recognition of a cause of action against federal officials who may have violated an individual's constitutional rights was subject to special factors which might make the remedy inappropriate. In the military context, the special factors present were those discussed by this Court in *Feres v. United States, supra.* In *Feres* it was held that the Federal Tort Claims Act did not provide a remedy to military personnel for injuries suffered in service which might otherwise be actionable if civilian in nature. The basis for that decision was the special relationship between soldiers and their superior officers, and the improper effect on the maintenance of discipline that such suit would cause if allowed to proceed. *Chappell,* 462 *U.S.* at 298-299, 103 *S. Ct.* at 2365 citing to *United States v. Muniz,* 374 *U.S.* 150, 162, 83 *S. Ct.* 1850, 1858, 10 *L.Ed.*2d 805 (1963) and *United States v. Brown,* 348 *U.S.* 110, 112, 75 *S. Ct.* 141, 143, 99 *L.Ed.* 139 (1954).

As stated in *Chappell:*

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life." The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. The Court has often noted "the peculiar and special relationship of the soldier to his superiors,"

> and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . ." This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment. 462 *U.S.* at 300, 103 *S. Ct.* at 2365-66 (citations omitted).

The Court also noted that its view of the proper relationship between the courts and the military extended to the National Guard. In *Gilligan v. Morgan,* 413 *U.S.* 1, 93 *S. Ct.* 2440, 37 *L.Ed.*2d 407 (1973) suit was brought asking for review of the pattern of training, weaponry and orders of a state National Guard. Therein it was stated:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equiping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

Gilligan, 413 *U.S.* at 10, 93 *S. Ct.* at 2446 (emphasis in original), as quoted in *Chappell*, 462 *U.S.* at 302, 103 *S. Ct.* at 2366-67.

Based on the special status of the military and the fact that congress had otherwise provided a specific means for military personnel to have grievances reviewed, this Court concluded that a suit to recover damages for alleged constitutional violations by a superior officer could not be maintained. 462 *U.S.* at 304, 103 *S. Ct.* at 2368.

> The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.
>
> 462 *U.S.* at 304, 103 *S. Ct.* at 2367.

The decision in *Chappell* was limited to the cause of action under *Bivens*. The issues raised by the claim under 42 *U.S.C.* § 1985 were not reached because not addressed by the Court of Appeals nor adequately argued before this Court. 462 *U.S.* at 305, n.3, 103 *S. Ct.* at 2368.

In *Bivens*, it was acknowledged that the cause of action created was the equivalent of the right to sue an individual acting under color of state law pursuant to 42 *U.S.C.* § 1983. 403 *U.S.* at 391, n.4, 91 *S. Ct.* at 2002. It would therefore follow that for the same reasons expressed in *Chappell*, an action under 42 *U.S.C.* § 1983 by military personnel against superior officers should be barred. That is exactly the result reached in *Martelon v. Temple*, 747 *F.*2d 1348 (10th Cir. 1984), cert. den.—*U.S.*—, 105 *S. Ct.* 2675 (1985). The plaintiff in *Martelon* was a member of the Colorado National Guard who was also employed as a

civilian administrative supply technician. After a military transfer, there was no comparable civilian activity available in his new unit and his civilian job was terminated because the new military assignment was incompatible with continued technician employment. 747 *F.*2d at 1349. The action brought sought relief from termination as a Guard Technician. The relevant cause of action asserted was for failure to provide a hearing before terminating technician employment which was brought pursuant to 42 *U.S.C.* § 1983.

Citing to *Chappell* and *Gilligan,* the Tenth Circuit found that there could be no liability under Section 1983 for alleged transgressions by superior officers against military personnel. Id. at 1351.

In other cases brought by military personnel against superior officers under various provisions of the Civil Rights Acts, the courts have had little difficulty in holding that dismissal was the required result. *Brown v. United States,* 739 *F.*2d 362 (8th Cir. 1984), cert. den.—*U.S.*—, 105 *S. Ct.* 3524 (1985), concerned an incident in which a black National Guardsman was subject to a racially motivated mock lynching. An action was brought against the participants in the lynching incident as well as against the United States and superior officers for failing to prevent it and failing to adequately investigate after the fact. While the Eighth Circuit concluded that the action against the participants, who were not superior officers, could go forward, summary judgment was ordered as to the United States and all other defendants. Relying on *Feres* and *Chappell,* the Eighth Circuit found that the *Feres* doctrine can be a bar to a Section 1983 suit where it is determined

that circumstances so warrant. The key factor taken into account by the court in *Brown* was, again relying on *Feres*, the effect on military discipline.

While prosecution of a cause of action against those who participated in the hanging incident was found not to damage military discipline, that was not so for failure to prevent the hanging incident and failure to perform a proper investigation. The claim that there was negligence in failing to prevent the incident was found to directly call into question disciplinary decisions by superior officers. 739 *F.*2d at 369. The same held true of the alleged failure to perform a proper investigation. *Ibid.*

Yet another court applied *Chappell* in a civil rights context to bar a cause of action in *Mollnow v. Carlton*, 716 *F.*2d 627 (9th Cir. 1983), cert. den. 465 *U.S.* 1100, 104 *S. Ct.* 1595, reh. den. 466 *U.S.* 954, 104 *S. Ct.* 2162. Mollnow alleged that a conspiracy existed to remove him from the Air Force Reserve because of his superior officers' embarrassment over their having ignored his warnings about certain unsafe conditions. Along with a *Bivens* claim, he asserted causes of action under 42 *U.S.C.* §§ 1985 and 1986.

Recognizing that *Chappell* directly barred the *Bivens* claim, the court turned to what had not been reached in *Chappell*, a claim under Section 1985. Because the claim arose under Section 1985(a), a statute granting a remedy for injured federal officers, the general limitations expressed in *Bivens* for allowing a claim regarding violation of constitutional rights were held inapplicable. 716 *F.*2d at 631. Nevertheless the rationale of *Chappell* and *Feres* was still utilized.

After noting that *Feres* relies primarily on the maintenance of military discipline, the court in *Mollnow* stated:

> A § 1985(1) action would strike directly at that special military relationship, perhaps even more so than an action for negligence. In a negligence action, a spontaneous event has occurred; someone has suffered an accident and another is at fault. Under § 1985(1), however, an action would lie even for calculated decisions made in the judgment and discretion of a superior military officer, so long as the subordinate alleged the superior had interfered with his military "duties." Then a *civil* jury would be empanelled to inquiry into the nature of this uniquely military matter, and damages could be assessed against his superiors for the exercise of their judgment and discretion. Such a result would offend the principles announced in *Chappell*, . . .
>
> 716 *F.*2d at 631 (emphasis in original)

Any challenge to military orders was found best left to the internal system of military justice. If challenges to orders were allowed to be brought in the civil courts, "[T]he military could not function under those conditions." 716 *F.*2d at 632.[2]

The same result was reached as to a claim under Section 1985(3) in *Alvarez v. Wilson*, 600 *F. Supp.* 706 (N.D. Ill. 1985). See also *Gaspard v. United States*, 713 *F.*2d 1097 (5th Cir. 1983), cert. den.—*U.S.*—, 104 *S. Ct.* 2354, 80 *L.Ed.*2d 826 (1984) and *Jaffee v. United States*, 663 *F.*2d 1226 (3d Cir. 1981) (en banc), cert. den. 456 *U.S.* 972, 102 *S. Ct.* 2234, 72 *L.Ed.*2d 845 (1982).

The above line of cases leaves no room for any conclusion other than that the cause of action asserted here

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[2]The Section 1985 claim, having been dismissed, and because relief under Section 1986 depends on a claim under Section 1985, the Section 1986 cause of action was also dismissed. 716 *F.*2d at 632.

under Section 1983 may not be asserted absent a showing that the particular decision attacked would not have an effect on necessary military discipline. In rejecting this argument, the District Court did not go beyond the fact that the termination of employment challenged related to the plaintiffs' status as civilian technicians. However, this logic was overly simplistic and ignored the realities of the relationship of the work done by technicians to the military mission of the National Guard. The decision to terminate the employment of these plaintiffs was due to the threat their actions posed to completing the military mission of the Guard and so fits precisely into the *Feres-Chappell* line of cases.

The overall mission of the National Guard is stated in 32 *U.S.C.* § 102:

> In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defense of the United States be maintained and assured at all times . . .

When the National Guard Technician Act of 1968 was passed, 32 *U.S.C.* § 709, it created a dual status for those employed. While on the one hand they are employees of the United States Army and the United States Air Force performing technician functions, at the same time in order to be eligible to be a technician, it is necessary that one be a member of the National Guard and hold the appropriate military grade specified. 32 *U.S.C.* § 709(b). The entire legislative history of this statute makes it evident that technicians are not regular civilian employees, but are instead military men whose conduct must be judged according to military rather than civilian standards.

As noted in *American Federation of Government Employees v. Federal Labor Relations Authority*, 730 *F.*2d 1534 (D.C. Cir. 1984) while on its face the Technician Act may have appeared to deal only with retirement benefits, in fact:

> enactment of the Technician Act was essential to assure that the *military* mission of the Guard would be carried out effectively and efficiently. This intent is evident in the provisions which provide for the continuance of the authority of the state adjutants general to exercise command authority over technicians—*as they do over other guardsmen.*
>
> 730 *F.*2d at 1544 (emphasis in original)

The Third Circuit has also seen fit to emphasize the military nature of the Guard in the context of employment of technicians under this statute. Rejecting a claim by the labor union in that case, the same one which represents the plaintiffs here, the Third Circuit held that the general bargaining provisions of the Federal Labor Relations Act did not displace Section 709(e) of the Technician Act. In doing so the court held:

> Congress deemed § 709(e) to be of considerable importance to the proper functioning of the National Guard as a military unit . . .
>
> *New Jersey Air National Guard v. FLRA*, 677 *F.*2d 276, 286 (3d Cir. 1982), cert. den. 459 *U.S.* 988, 103 *S. Ct.* 343, 74 *L.Ed.*2d at 384.

The Third Circuit went on to refer to the "needs of military discipline over Guard Technicians and their dual status as civilian and military personnel . . ." *Ibid.* The Ninth Circuit has approvingly cited to the *New Jersey Air National Guard* case. *Montana Air National Guard v. Federal Labor*

Relations Authority, 730 *F.*2d 577 (9th Cir. 1984) and *California National Guard v. Federal Labor Relations Authority*, 697 *F.*2d 874 (9th Cir. 1983).

The particular subject matter of the *American Federation of Government Employees* case is especially revealing. The union there sought to negotiate a provision requiring that when a reduction in force, authorized by 32 *U.S.C.* § 709(e)(4), takes place, technicians would be ranked only according to a technician appraisal score without regard to military performance. The District of Columbia Circuit rejected the notion that such a proposal was a required subject of negotiations.

In reaching its conclusion, the court thoroughly reviewed the legislative history of the National Guard Technicians Act of 1968. It noted that "it was necessary to carefully craft the legislation so as not to compromise the essential military requirements of state Guard service." 730 *F.*2d at 1543. After quoting the remarks of various senators and congressmen, the court opined that:

> . . . *the purpose of the technicians was to insure that the military mission of the National Guard* would be carried out effectively and efficiently. This "fundamental purpose," as Senator McIntyre put it, renders easy the search for the Act's "mandate." *That mandate is to preserve the Guard's military effectiveness and efficiency,* which is accomplished by the Act insuring the Guard's ability to recruit and maintain technicians qualified for *both* their civilian and military roles and preserving the command authority of the state adjutants general in personnel actions in general and reductions-in-force in particular.
>
> 730 *F.*2d at 1545-1546 (emphasis in original)

Because limiting reduction in force ratings to those on the technician side would damage the military purpose of

the Guard, the court held that the clause the union sought to put in its contract would be "incompatible with sound defense planning of our military preparedness . . ." *Id.* at 1546.

The issue in the *New Jersey Air National Guard* case was whether the Guard must negotiate procedures for dismissal for cause and other matters as to which authority is granted Adjutants General pursuant to 32 *U.S.C.* § 709(e). Were Adjutants General required to submit dismissals and other disciplinary actions to a grievance procedure, the congressional intent of allowing the military command structure to function in such situations as evidenced by Section 709(e) would be damaged, and so the Third Circuit held that the general provisions of the Labor-Managment Relations Chapter of the Civil Service Reform Act of 1978 regarding collective negotiations for federal employees must give way to the specific grant of authority to Adjutants General to dismiss technicians.

That dismissal of a technician even where allegedly based on arbitrary and capricious hostility of superior officers is sufficiently military in nature to be beyond review by civilian courts was expressly stated by the Fifth Circuit in *NeSmith v. Fulton*, 615 *F.*2d 196 (5th Cir. 1980). While finding that on all other relevant grounds, the Fifth Circuit test for whether courts would deal with military issues set forth in *Mindes v. Seaman*, 453 *F.*2d 197 (5th Cir. 1971) had been met, the court in *NeSmith* still found dismissal mandated.

> In contrast, consideration of the extent to which the exercise of military expertise or discretion is involved in the decision to discharge NeSmith from a civilian technician post counsels against according judicial re-

> view of his claim. The same great degree of military discretion is entailed in deciding whether to remove an employee "for cause" as is involved in such matters as "promotions or orders directly related to specific military functions" that *Mindes* expressly found were improper subjects for judicial review.
>
> 615 *F.*2d at 203.

The breadth of the doctrine barring damages against the military is readily apparent from the en banc decision of the Eighth Circuit in *Miller v. United States,* 643 *F.*2d 481 (8th Cir. 1981). The plaintiff in that case was an Army private who on his off-duty time was working in a civilian job for a subcontractor erecting scaffolds on government owned family living quarters. In the course of performing that civilian work, Miller was electrocuted. The District Court dismissed the action on the basis of *Feres* but was reversed by a panel of the Eighth Circuit. On rehearing en banc, the Eighth Circuit reinstated the dismissal.

In concluding that *Feres* applied to bar Miller's action, the court found that the work he performed, although being done for a civilian employer, "was related to the military mission of the base, since it involved construction of residential quarters to be owned by the Government and located on the base." 643 *F.*2d at 494. The key was that Miller was at all times subject to recall for military duty had his superior officer so chosen, and the "immediacy of his peculiar and special relationship to his military superiors had not been severed by any such formality as a furlough, leave, or pass." *Ibid.* Even more telling was the following:

> Finally, if this case were permitted to go to trial, plaintiffs would seek to establish that the United States, presumably acting through the commanding officer of

> the post at which Private Miller was stationed, was negligent in, among other respects, failing to de-energize the electric line with which the scaffolding being erected by Miller came into contact. Thus, the conduct of Miller's military superior would be called in question in the civil courts, a circumstance that might well have the destructive effect on military authority and discipline mentioned by the Supreme Court in *Brown*. In any event, the relationship between the facts of this case and possible impairment of military discipline is at least as great as it was in *Feres* itself. *Ibid.*

If the facts of *Miller* present a threat to military discipline, then surely the facts here present a far greater one. There is no dispute that this case arose out of objections by technicians to a proposed change in their work hours for one particular day. As a result of these objections, a meeting was held at which the subject of compliance with the orders for the new schedule was discussed. While the parties have disputed whether or not the plaintiffs advocated refusing to report or other means of work slowdown, for purposes of deciding the issue before this Court, resolution of that dispute is not necessary. The mere fact that the subject matter involved compliance with orders from superior officers as to performing work should be enough to make it clear that this case falls within the *Feres* and *Chappell* precedent.[3]

That the subject matter of scheduling for technicians at Air Defense facilities is directly related to military preparedness is irrefutably established by the statute. 32 *U.S.C.* § 709(g)(1) provides:

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[3]For discussion of the facts, see the initial Third Circuit opinion in this case, 776 F.2d 75, 77-78 (3d Cir. 1985), at pages 48a-51a of the appendix to the Petition for Certiorari.

> Notwithstanding Sections 5544(a) and 6101(a) of Title 5 or any other provision of law, the Secretary concerned may, in the case of technicians assigned to perform operational duties at air defense sites—
>
> (A) prescribe the hours of duty;
>
> (B) fix the rate of basic compensation; and
>
> (C) fix the rates of additional compensation;
>
> to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays . . .

This is an unequivocal grant of authority to require that technicians work at times when they would not ordinarily be working when necessary for performance of their functions.

At the time of the relevant events, the work being done by the technicians related to a national security directive mandating that the Tactical Fighter Wing to which these technicians were assigned be combat ready by October 1, 1981. Any disruption of performance of work as a protest against the hours assigned would have placed compliance with that directive in jeopardy. If that does not implicate decisions of superior officers which are part and parcel of the required system of discipline reasonably related to assuring the federal military purpose of the Guard, then it is hard to see what would be. If this Court wishes to maintain the policies underlying *Feres* and *Chappell,* then it is vital that the kind of action for damages at issue here be prohibited.[4]

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[4]The petitioner does make this argument in Point II of the Petition for Certiorari.

POINT TWO

THE STATUTE PROVIDING AUTHORITY FOR THE ACTION TAKEN DOES SO AS A MATTER OF FEDERAL LAW SO THAT THE ADJUTANT GENERAL DID NOT ACT UNDER COLOR OF STATE LAW, AND IN ANY EVENT THE STATUTE PREEMPTS THIS CAUSE OF ACTION.

The termination of the employment of plaintiffs was effectuated pursuant to 32 *U.S.C.* § 709. Thus, the source of authority was federal and not state law. As a result, the defendants did not act under color of state law as required for an action under 42 *U.S.C.* § 1983.

The arguments supporting this position have been ably set out in the petition for certiorari and will not be repeated at length here. AGAUS would simply like to reemphasize that the decisions relied upon by Judge Rosenn in dissent accurately reflect the facts here and are a sounder basis for deciding this question than those relied upon by the majority. In particular, Judge Rosenn correctly narrows his inquiry to the particular action being challenged to see if authority conferred by state law played a role. Aside from the fact that the Adjutant General is appointed at the state level, it is federal law which completely governs these facts. Absent 32 *U.S.C.* § 709 there would be no technicians and there would be no authority on the part of an Adjutant General to dismiss them from employment. Where someone holds state employment, but in a particular situation is acting as an agent of the federal government, it is much more reasonable to find that that person is acting under color of federal law. *Ellis v. Blum,* 643 *F.*2d 68 (2d Cir. 1981); *Askew v. Bloemker,* 548 *F.*2d 673 (7th Cir. 1976).

Furthermore, the plaintiffs here had available and used a remedy of appealing their dismissal by virtue of an action under the Administrative Procedure Act. Claims for back pay have been transferred to the United States Court of Claims. As Judge Rosenn argues, the concerns expressed by this Court in *Bush v. Lucas,* 462 *U.S.* 367, 103 *S. Ct.* 2404, 76 *L.Ed.*2d 648 (1983) are equally applicable here. Just as the civil service remedy there barred a *Bivens* cause of action, so too should the specific remedy granted National Guard Technicians void the statutory equivalent of *Bivens,* an action under 42 *U.S.C.* § 1983.

For these additional reasons, the decision of the Third Circuit is an erroneous one which needs to be rectified by this Court. Accordingly, the claim for damages under 42 *U.S.C.* § 1983 should be dismissed.

———o———

CONCLUSION

For the aforestated reasons, the petition for certiorari should be granted, and the decision of the Third Circuit should be reversed.

Respectfully submitted,

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Dated: July 15, 1986

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 82-2578

ROY A. JOHNSON and JOHN J. SHELLER,

Plaintiffs,

v.

VERNE ORR, Secretary, Department of the Air Force; FRANCIS GERARD, Major General, The Chief of Staff (Adjutant General) State of New Jersey Department of Defense; WILFRED C. MENARD, JR., Major General; COLONEL JOHN MURPHY, New Jersey Air National Guard; BRIGADIER GENERAL CHARLES YOUNG, Air Commander, New Jersey Air National Guard,

Defendants.

OPINION

(Filed Dec. 22, 1983)

THOMPSON, District Judge

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This case has been brought by Plaintiffs Roy Johnson and John Sheller. Both were civilian federal employees with the New Jersey Air National Guard ["NJANG"]. Plaintiffs were dismissed from their positions as NJANG technicians for conducting a union meeting and advocating a "job action." They have now brought suit against Defendants Orr, Secretary of the U.S. Department of the Air Force, and Gerard, Chief of Staff of the NJANG, in their official capacities. They have also brought suit against Defendants Menard, Chief of Staff of the NJANG when plaintiffs were dismissed, Murphy, plaintiffs' supervisor, and Young, Commander of the NJANG at Mc-

Guire Air Force Base when plaintiffs were dismissed as individuals.

As to Defendants Menard, Murphy and Young ["defendants"], plaintiffs allege that the defendants fired them in retaliation for exercising their First Amendment rights. They charge that the defendants acted in an arbitrary and capricious fashion to deny them of their property in violation of their constitutional rights and without adequate due process. Plaintiffs request damages under 42 U.S.C. § 1983, and directly under the Constitution in a *Bivens* cause of action. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Plaintiffs also asked for review of the NJANG's determinations under the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.*, and for damages under the Back Pay Act, 5 U.S.C. § 5596.

In its opinion of March 8, 1983, this court recognized plaintiffs' right to proceed in this action except as to monetary claims against the federal government, which were transferred to the Court of Claims. Individual defendants Murphy, Menard and Young now move to dismiss the claims against them in light of two recent Supreme Court cases, *Bush v. Lucas,* 103 S.Ct. 2404, 51 U.S. L.W. 4752 (1983) and *Chappell v. Wallace,* 103 S.Ct. 2362, 51 U.S.L.W. 4733 (1983).

The case of *Chappell v. Wallace* does not preclude a *Bivens* action against defendants in this case. *Chappell* provides that federal courts should not imply a cause of action directly under the constitution when it will interfere with military discipline. The logic of the case is that courts are ill-equipped to weigh the factors that go into

the unique need for discipline between a soldier and his or her superior. The Court explicitly premised its decision on the existence of a "framework of . . . intra-military administrative procedures to which courts should defer," and an "exclusive system of military justice." The court stated:

> The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.

51 U.S.L.W. 4733, 4735 (1983).

I find that these factors unique to the military were not at work in this case. The plaintiffs' cause of action arose specifically as a result of the plaintiffs' civilian employment activities, and not as a result of their militia positions. As technicians, plaintiffs were not covered by the comprehensive system of intramilitary justice referred to in *Chappell.* The technicians did not fall into the narrow category of concerns in the relationship between a soldier and his or her superior to which *Chappell* applies. The application of a *Bivens* remedy to a New Jersey Air National Guard technician in an employment-related claim would not unduly impair the operation of the military. In *Chappell,* plaintiffs had requested damages for discriminatory military assignments. The assignments were "incident to military service." Here, Johnson and Sheller claim their firings and denial of due process were as a result of their union activities. Their claims are incident to their civilian employment, not their militia activities.

This is a distinction the Third Circuit appeared to make in *Chaudoin v. Atkinson,* 494 F.2d 1323 (3d Cir.

1974), when the court held that the refusal of a New Jersey Air National Guard technician to participate in a military duty, funeral firing squad detail, did not justify dismissal of the technician from his civilian employment duties. The court held that in the decision whether to fire Chaudoin, the Adjutant General must judge him "as a technician and not as a member of the National Guard." *Id.*, at 1331. Here, I find that the court must judge this situation as one of employer-employee relations, not as one of soldier-military commander relations.

I do not lightly dispose of the defendants' concern that it is difficult to separate plaintiffs' employment and military functions since the commanders serve as both military and non-military superiors to the plaintiffs, and since plaintiffs' civilian job is ultimately related to the National Guard's military function. The *Chappell* exception to *Bivens* is carefully framed in narrow terms, however. Unless the exception should swallow the rule, I find the plaintiffs' civilian employment related claim should not be governed by the *Chappell* exception.

Defendants also urge that the recent Supreme Court case of *Bush v. Lucas, supra,* compels that the Court reverse its opinion that a *Bivens* remedy would apply to this case. In *Bush v. Lucas,* an aerospace engineer was demoted in his federal job for certain statements he made to the press. He attempted to sue his employers directly under the Constiution for damages for the violation of his First Amendment rights.

For the purposes of deciding whether a *Bivens* remedy ought to apply, the Supreme Court assumed that (1) Bush's First Amendment rights were violated by the ad-

verse personnel action; (2) administrative remedies were not as effective as individual remedies and did not fully compensate Bush for the Constitutional harm (*e.g.*, did not award punitive damages or attorneys' fees); and (3) Congress had not provided an alternative statutory remedy that was to be the *exclusive* remedy for the harm alleged.

The Court held that even though the statutory remedy did not provide a complete remedy for the constitutional wrong, courts should not imply a *Bivens* remedy. Federal personnel policy is an area more appropriately left for Congressional action, and therefore constitutes a "special factor counselling hesitation," which would prohibit the courts from creating a new remedy. The "conflicting interests involved in providing job security, protecting the right to speak freely, and maintaining discipline and efficiency in the federal workforce" is an area over which Congress and not the courts should have control. *Bush* at 4757.

The court stated that:

> The question is not what remedy the courts should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addi-

> tion of another remedy for violations of employees' First Amendment rights . . . . In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service . . . . Thus we do not decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights . . . because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.

51 U.S.L.W. 4758-59.

The fact of a comprehensive statutory system of remedies is not determinative of whether a court should imply a *Bivens* cause of action. Rather, the system was treated by the Supreme Court in *Bush* as an example of how difficult questions of federal personnel policy are, and how a court's interference in these balances would undermine those choices made by Congress.[1] Therefore, in light of the inherent and demonstrated interest of Congress in establishing federal personnel policy, the Court should hesitate to imply a remedy unless the area of personnel policy is one where Congress has abrogated its interest and judicial establishment of a remedy would not interfere in any balancing of rights Congress has undertaken.

In the present case, I find *Bush* does apply. The court does not dispute that the remedy available to plain-

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[1] The comprehensiveness of the remedy provided by Congress is also significant in determining whether the remedy is so constitutionally inadequate that the court might be obliged to imply a remedy for the vindication of constitutional rights. 51 U.S.L.W. 4756, n. 14. This point is not at issue here.

tiffs might be less effective or complete than a cause of action directly under the Constitution. I find, however, that Congress is more competent to assess issues of personnel policy for the federal employees of the National Guard, as described by the theory of *Bush*. Congress specifically undertook to bring technicians under federal control in the 1968 National Guard Technician's Act, 32 U.S.D. § 709. With that Act, Congress decided the remedy available to technicians for employment actions, including that a technician cannot be fired from civilian employment without cause, § 709(e)(3), or unless first separated from requisite National Guard membership, § 709(e)(1) and (2). The legislative history of the Act makes clear that Congress balanced issues of federal personnel specific to National Guard technicians, including the need for state controls which would not apply to other civil service employees. *House Report No. 1823,* reprinted in 1968 U.S. Code Cong. and Admin. News 3324. *See also New Jersey Air National Guard v. F.L.R.A.,* 677 F.2d 276 (3d Cir. 1979). I therefore find that as in the *Bush* situation, Congress is the appropriate body to have weighed the intricacies of the dual status of these federal employees and to make policy decisions regarding technicians' remedies for adverse employment actions. In the absence of a Congressional remedy, the court shall not imply one.

I note that this is not a case where Congress has denied all remedies. Plaintiffs had an administrative hearing which was reviewed by the Adjutant General. The plaintiffs claim that these procedures were rendered ineffective by the defendants' actions. This court has already held that our own review of the administrative de-

liberations can remedy this deficiency, and that the court can award reinstatement and injunctive relief. The Court of Claims may award back pay and attorneys' fees.

While the scheme of employee rights available to the plaintiffs may not be as comprehensive as the civil service scheme described in *Bush,* I find that it does evidence a Congressional weighing of a variety of factors in an area of specific Congressional concern, federal personnel policy. I believe that in light of the Supreme Court's recent analysis in *Bush,* it would be imprudent for the court to interfere with these balances by allowing a *Bivens* remedy. *See also Hansen v. U.S. Dept. of the Air Force,* Civil No. 80-685 (September 14, 1983, D.N.J.), in which Judge Gerry dismissed the *Bivens* claim of a New Jersey Air National Guard technician in light of *Bush v. Lucas.*

Defendants apparently also argue that if the *Bivens* claims against them are dismissed in light of *Bush,* then the 42 U.S.C.A. § 1983 claims must also be dismissed under the same analysis. I find that the logic in *Bush* is not equally applicable to the § 1983 claims, and that defendants' motion as to this point will be denied.

The *Bush* case specifically addresses when courts should imply a remedy in an area of distinct Congressional concern where Congress has not authorized a remedy. In the § 1983 case, Congress *has* provided a specific remedy. Namely, when a person acts under the color of state law to deprive another person of a constitutional right, § 1983 specifically provides that the injured party does have a private cause of action. Defendants have cited no cases showing that a § 1983 complaint should be dismissed in a case such as this. In fact, in *Chappell,*

supra, a case similar to *Bush* in that the Supreme Court refused to allow a *Bivens* claim due to special factors counseling hesitation, the Court declined to decide whether or not an action under 42 U.S.C.A. § 1985 could be maintained. 51 U.S.L.W. at 4736, note 3.

Although the court will follow *Bush v. Lucas* and refrain from implying a cause of action directly under the constitution in this case, where such a cause of action has already been provided by Congress, premised on the condition that defendants' actions were under the color of state law, the court will not dismiss the count.

Finally, General Menard argues that the complaint should be dismissed against him under a theory of judicial immunity. General Menard is the Adjutant General and Chief of Staff of the New Jersey Department of Defense. Menard was responsible for determining whether or not to accept the hearing examiner's recommendations to dismiss the plaintiffs. He claims that in doing so, he acted in a judicial capacity and therefore is immune from an action for damages. In the alternative, Menard argues that he is a state officer entitled to qualified or "good faith" immunity for acts performed in the course of his official responsibilities.

The court is not convinced that the Adjutant General should be entitled to judicial immunity. Although his duty in this case involved reviewing a record and rendering a decision, this alone should not qualify him for the kind of immunity accorded to members of the judiciary and court system. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978). Rather, the judgment made by Menard was clearly in the realm of an employment de-

cision. To afford these kinds of employment decisions, judicial immunity, even when based on a formal hearing, would be an extension of the doctrine of judicial immunity.

Rather, *Scheuer v. Rhodes,* 416 U.S. 232 (1974) has established that an Adjutant General's decisions are entitled to a qualified good faith immunity. If Menard's actions violated plaintiffs' constitutional rights, and were outside the scope of his office, arbitrary, malicious or an abuse of power, he will be held accountable. *Scheuer,* and *Procunier v. Navarette,* 434 U.S. 555 (1978). A finding of immunity depends on all of the circumstances that are revealed by the evidence and as they reasonably appeared at the time of Menard's actions. *Scheuer.* At this time, the court will not conclude that Menard is immune from suit. The circumstances as to Menard's intent in light of plaintiffs' allegations of retaliation, malice and bad faith are not developed sufficiently for the court to make a judgment as to the extent of any immunity it might grant to defendants. The court is aware of the policy considerations discussed in *Sheuer* relating to the necessary discretion allowed to state officials in the exercise of their official duties. At this time, however, a judgment as to immunity would be premature.

In conclusion, the court will dismiss plaintiffs' cause of action directly under the constitution in light of the Supreme Court's recent holding in *Bush v. Lucas, supra.* The remainder of defendants' motion will be denied.

December 21, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 82-2578

ROY A. JOHNSON and JOHN J. SHELLER,
Plaintiffs,

v.

VERNE ORR, Secretary, Department of the Air Force; FRANCIS GERARD, Major General, The Chief of Staff (Adjutant General) State of New Jersey Department of Defense; WILFRED C. MENARD, JR., Major General; COLONEL JOHN MURPHY, New Jersey Air National Guard; BRIGADIER GENERAL CHARLES YOUNG, Air Commander, New Jersey Air National Guard,
Defendants.

ORDER

(Dec. 22, 1983)

This matter having come before the court on defendant Menard, Murphy, and Young's motion to dismiss and the court having considered this motion and opposition and the oral argument, briefs and supporting papers submitted by the parties and for the reasons stated in the court's opinion filed even date herewith; it is on this 21st day of December 1983,

ORDERED that defendants' motion to dismiss counts brought directly under the constitution is granted; and it is further

ORDERED that defendants' motion to dismiss counts brought under 42 U.S.C.A. is denied; and it is further

ORDERED that defendant Menard's motion to dismiss the complaint for reasons of immunity is denied.

/s/ Anne E. Thompson, U.S.D.J.